112-217

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~918~~ ~~1023~~ 286

THE BOARD OF COUNTY COMMISSIONERS OF LABETTE COUNTY, KANSAS, AND THE CLERK OF SAID BOARD AND THE CLERK AND TREASURER OF SAID COUNTY OF LABETTE, KANSAS, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES EX REL. CLARENCE F. MOULTON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED SEPTEMBER 30, 1882.

SUPREME COURT OF THE UNITED STATES.

No. 948.

THE BOARD OF COUNTY COMMISSIONERS OF LABETTE COUNTY, KANSAS, AND THE CLERK OF SAID BOARD AND THE CLERK AND TREASURER OF SAID COUNTY OF LABETTE, KANSAS, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES EX REL. CLARENCE F. MOULTON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED SEPTEMBER 30, 1882.

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1 In the Circuit Court of the United States, District of Kansas.

The United States of America *ex relatione* Clarence F. Moulton
v.
The Board of County Commissioners of Labette county, Kansas, the Clerk of said Board & the Clerk of said county of Labette, and the Treasurer of said county of Labette, State of Kansas.

Be it remembered that on this day, to wit, June 10, 1881, the plaintiff, by his attorneys, filed in the clerk's office of said court his information for mandamus in said entitled action, which said information is in words and figures following, to wit:

In the Circuit Court of the United States, District of Kansas.

The United States of America *ex relatione* Clarence F. Moulton
2 *v.*
The Board of County Commissioners of Labette county, Kansas, the Clerk of said Board & the Clerk of said county of Labette, and the Treasurer of said county of Labette, State of Kansas.

Information for Mandamus.

To the Honorable the Judges of said court:

Your relator, Clarence F. Moulton, respectfully shows unto your honors that heretofore, to wit, on the 7th day of June, 1877, by the consideration of this honorable court, in a certain action, theretofore depending therein, wherein your relator was plaintiff and the township of Oswego, in said county of Labette, State aforesaid, was defendant (the same being cause No. 1653)—

Your relator recovered a judgment against the defendant therein for $9,221.34, damages & costs & accruing costs, to wit, $500, which said judgment bears interest at seven per cent. per annum from the rendition thereof, & is still in full force and effect, and in nowise reversed, vacated, modified, or satisfied.

Further, your relator shows that the aforesaid damages and costs so recovered as aforesaid were for so much money then and there due and owing to your relator from the defendant in said cause upon
3 certain coupons or interest warrants made for and representing the instalments of interest theretofore accruing upon certain bonds issued by the said board of county commissioners in behalf of and as trustees of the said township of Oswego under and in pursuance of the laws of the State of Kansas, and especially of chapter 90 of the Laws of 1870 of said State, and in accordance with a vote of the electors of said township, all of which matters and things will more

fully and at large appear by the record and proceedings in said cause, now remaining in this court, to which reference is made.

Further, your relator shows to the court that under the laws of the State of Kansas no executions upon judgments at law is authorized or can be issued against such corporations as the said township or said board, but that your relator's sole and only remedy is by the mandamus of this court to compel the said board and the others, the said defendants, to levy, collect, and pay over a tax sufficient to pay his said judgment, interest, and costs on the taxable property of and within the boundaries of the said township of Oswego.

Thereupon the maturity of said coupons and upon the ren-
4 dition of said judgment it became and was the duty of the said defendants, the said board, and of the other the said defendants, as well by the law of the land as by the especial statute under which said bonds were issued, and the statutes of Kansas, to levy, collect, and pay over to your relator a tax upon all the taxable property within said township sufficient to pay said judgment, interest, and costs, and costs of increase, and that particularly it became and was the duty of said board then and there to levy and collect such tax on such property sufficient to pay such judgment, and especially it so became & was such duty under § 6 of the said chapter 90 of the laws of said State passed in the year 1870, and to do and perform in the manner and at the time required by law each and every, all and singular, the matters and things in respect to this special tax that are by law to be done by them in respect to general taxation, and it particularly became and was the duty of said clerk of said board and said county, under the said laws of said State, to enter on record such levy of such tax, and to enter the same on a tax list or roll, and to record the proceedings of said board
5 in respect to such taxation and all proceedings that by law should be had and recorded in reference to taxation, and to determine, extend, and to carry out the sum or sums of money to be levied or extended against each and every tract or lot of land, and all other taxable property as provided by said laws, and to set down such tax in a separate column, and to complete the said roll or list in the manner and at the time required by law, and to attach thereto his certificate and the seals of said county and corporation, and deliver the same to the said county treasurer at the time and in the manner required by law, and to do and perform in the proper manner and at the proper time each and every act and thing by law required to be done in respect to taxation.

And especially it became and was the duty of said treasurer to accept and receive such tax roll and list from said clerk, and to proceed as provided by law to collect such tax and to publish the list required by law, and to distrain for said tax, and to advertise lands for sale for the non-payment of the same, and to offer the same for sale and strike them off at such sale, all at the time and in the manner provided by law, and to take each and every, all and singular, the
6 process and proceedings, and do and perform each and every

act and duty imposed upon him by law in respect to the enforcement and collection of the taxes, the same in respect to this tax as to other and general taxes, and at the time and in the manner provided by law, and to pay such tax over to the relator, or unto the court for his use.

Further, your relator shows to the court that heretofore, to wit, on the 12th day of April, A. D. 1881, he demanded of each and every of the said defendants the performance of their said several duties; and the said defendants, and each of them, have hitherto neglected and refused to perform the same, or any of them, and still so neglect and refuse.

Wherefore, and inasmuch as your relator is without any plain, speedy, and adequate remedy in the ordinary course of the law, he prays that the writ of mandamus of the United States of America may issue out of this court in due form of law commanding the performance of their said several duties by the several defendants; and he will ever pray.

CLARENCE F. MOULTON,
Relator.

By S. E. BROWN, *His Att'y.*

7 In the Circuit Court of the United States, District of Kansas.

The United States of America *ex relatione* Clarence F. Moulton
v.
The Board of County Commissioners of Labette county, Kansas, the Clerk of said Board and the Clerk of said county of Labette, and the Treasurer of said county of Labette, State of Kansas.

Comes now the relator herein, and, upon the information and affidavit herein, moves the court that a writ of mandamus issue as prayed.

S. E. BROWN,
Att'y for Relator.

UNITED STATES OF AMERICA,
District of Iowa.

I, S. E. Brown, being duly sworn, do say that I am the attorney of the relator in this cause; that I know the contents of the foregoing information, and that the statements thereof are true, as I verily believe.

S. E. BROWN.

Subscribed and sworn to before me this 10th day of June, 1881.

[SEAL.] A. S. THOMAS, *Clerk.*

8 On hearing the within information, motion, and affidavit, ordered that an alternative writ of mandamus issue as prayed in due form, returnable to the next term of this court.

(Endorsed:) No. 1992. In U. S. Circuit Court, District of Kansas. The U. S. *ex rel.* Clarence F. Moulton *v.* The Bd. of Co. Com. of Labette co., Kan. Information. Filed June 10th, 1882. A. S. Thomas, Clerk.

9 UNITED STATES OF AMERICA, District of Kansas, } *ss:*

In the Circuit Court of the United States, District of Kansas.

The United States *ex relatione* Clarence F. Moulton
v.
The Board of County Commissioners of Labette county, Kansas, and the Clerk of said Board and the Clerk of said county of Labette, and the Treasurer of said county of Labette, State of Kansas.

The United States of America to the said Board and the Clerk thereof, and to the Clerk of said county of Labette, and to the Treasurer of said county of Labette, State of Kansas, greeting:

Whereas it has been shown to our Circuit Court of the United States for the district of Kansas that the relator, who is a citizen of the State of New York, did, on the 7th day of June, 1877, by the consideration of this court, after due proceedings had in that
10 behalf, recover a judgment against the township of Oswego, in said county of Labette, for the sum of $9,221.34, with interest at 7 per cent. from the rendition thereof, with costs taxed $109.69, and with further costs taxed at about $400, the same being for so much money due and there owing to the relator from the said defendant upon divers coupons or interest warrants given for the several installments of interest before that time accruing upon sundry bonds theretofore issued or caused to be issued in the name and behalf of said Oswego township, in said county of Labette, by the said board of county commissioners of said county, pursuant to the act of the Legislature of said State entitled An act to enable municipal townships to subscribe for stock in any railroad and to provide for the payment of the same, approved February 25, 1870, and which said bonds were made payable to the Missouri, Kansas and Texas Railway Company, or bearer, and the said judgment being now in full force and effect, and in nowise vacated, modified, or reversed, all of which more fully appears from our records still remaining in our said Circuit Court; and whereas it further appears that it became and was the duty of said board to levy and collect and pay
11 over to the relator, as well as by the law of the land as by the statute under which said bonds were issued, a tax upon all the

taxable property in said township of Oswego as then constituted, and that it was the duty of said board to do each and every other and all and singular acts and doings to make effectual such tax; and whereas it further appears that it was and is the duty of the said clerk of said county and the clerk of said board to extend said tax and to enter the levy thereof of record, and to enter the same on the tax list or roll, and to record the proceedings of said board in respect to such taxation and all proceedings that by law should be had and recorded in reference to taxation, and to determine, extend, and carry out the sum or sums of money to be levied or extended against each tract or lot of land and other taxable property as provided by said laws, and to set down said tax in separate columns and to complete the said tax roll or lists in the manner and at the time required by law, to attach thereto his certificate and the seal of said county and corporation and deliver the same, the said tax list or roll, to the treasurer of said county at the time and in the manner required by law,
12 and to do and perform in the proper manner and at the proper time each and every act and thing by law required to be done in respect to taxation; and whereas it further appears that it was then and now is the duty of the treasurer of said county to accept and receive such tax roll or list from said clerk and to proceed as by law provided to collect such tax and to publish the list required by law, and to distrain for said tax and to advertise lands for sale for the non-payment of such taxes, and to offer the same for sale and strike the same off at such sale, all at the time and in the manner provided by law, and to take each and every, all and singular, the process and proceedings, and do and perform each and every act and duty imposed upon him by law, and in respect to the enforcement and collection of taxes, the same in respect to this tax as to other and general taxes, and in the manner and at the time provided by law, and to pay such taxes over to the relator, or into this court for his use;

And whereas it further appears to us that the due performance of your said several duties in this behalf hath been duly demanded of you and each of you, and that you have hitherto neglected
13 and refused, and do still neglect and refuse, to perform your said several duties; and it further appears to us that the relator is without any plain, speedy, and adequate remedy at law: Now, therefore, we being willing that full and speedy justice be done, do command that you, the said board of county commissioners of Labette county, State of Kansas, do forthwith levy and collect and pay over, or cause to be collected and paid over to the relator a tax on all the taxable property within the township of Oswego as constituted in the year 1870, and to do and perform in the manner and at the time required by law each and every and all singular the matters and things in respect to this special tax that are required by law by you to be done in respect to general taxation; and we do further command that you, the said clerk of the said board of the said county, do enter or record the levy of such tax, and enter the same on a tax roll or list, and record the proceedings of said board in re-

spect to such taxation, and all proceedings that by law should be had and recorded in reference to taxation, and determine, extend, and carry out the sum or sums of money to be levied or extended
14 against each and every tract or lot of land, and all other taxable property, as provided by said laws, and set down such tax in a separate column, and complete the said tax roll or list in the manner and at the time required by law, and attach thereto your certificate and the seal of your office and the seal of your county and corporation, and that you deliver the same, so sealed and signed, to the treasurer of your said county, at the time and in the manner required by law, and that you do and perform in the proper manner and at the proper time each and every act and thing by law required to be done in respect to taxation; and we command you, the said treasurer of said county, to accept and receive the said tax roll or list from said clerk, and to proceed as provided by law to collect such tax and to publish the list required by law, and to distrain for said tax, and to advertise lands for sale for the non-payment of such tax, and to offer the same for sale, and to strike them off at such sale, all to be done in the manner and at the time required by law, and to take each and every and all and singular the process and proceedings, and do and perform each and every act and thing imposed upon you by the law in respect to the enforcement or collec-
15 tion of taxes, the same in respect to this tax as to other and general taxes, at the time and in the manner provided by law, and that you pay the said monies to the relator, or into this court for his use.

Or that you, the said board, and the said clerk of said board, and the said clerk of said county and the said treasurer of said county, appear and show cause before our Circuit Court of the United States of America, in and for the district of Kansas, to be begun and holden at Topeka, in said district, before our said judges, on the 28th day of November, 1881, why you have not obeyed this writ, and that you make due return on this writ, with your certificate, of your acts and doings in the premises.

Witness Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, with the seal of said Circuit Court affixed, at Topeka, in said district, this 9th day of July, 1881.

[SEAL.] A. S. THOMAS, *Clerk.*

The within writ of mandamus allowed by the Circuit Court of the United States, district of Kansas, on the 10th day of June, 1881.

C. G. FOSTER, *Judge.*

16 UNITED STATES OF AMERICA,
District of Kansas, } *ss.*

I, B. F. Simpson, marshal of the United States for the district of Kansas, do hereby certify the within and foregoing to be a true, full,

and perfect copy of the original alternative writ of mandamus now in my possession, with all the endorsements thereon.

B. F. SIMPSON,
Marshal District of Kansas.
By S. P. WADE, *Deputy.*

U. S. Marshal's Return.

Received this writ this the 10th day of July, 1881, and served the same at the county of Labette, State and district of Kansas, on the 21st day of July, 1881, by delivering personally to George Thorntorn, treasurer of said county of Labette, State of Kansas, and to W. H. Knirsey, clerk of said county of Labette and clerk of the board of county commissioners of said county of Labette, and to J. J. Henderson, a member of the board of county commissioners of the said county of Labette, and to A. N. Russell, a member of the board of county commissioners of the said county of Labette, each a true and certified copy of the original alternative writ of mandamus, with all the endorsements thereon; at the same time I exhibited to
17 each of the above-named county officers, to wit, George Thorntorn, treasurer, W. H. Kuersey, clerk, and J. J. Henderson and A. N. Russell, members of the county board of commissioners of said county of Labette, the original alternative writ of mandamus, with the seal of this honorable court affixed thereto, and at same place and time I delivered personally to D. J. Doalen, chairman of the board of county commissioners of the said county of Labette, the original alternative writ of mandamus, with all the endorsements thereon, of which this writ is a true and certified copy thereof.

B. F. SIMPSON,
U. S. Marshal.
By S. P. WADE, *Deputy.*

Fees, $46.30. P'd by pl'ff.

(Endorsed:) No. 1992. U. S. *ex rel.* Clarence F. Moulton *vs.* The Board of County Commissioners of the County of Labette *et al.* Alternative writ of mandamus. Filed July 27, 1881. A. S. Thomas, clerk, by W. W. Gelatt, deputy.

18 In the Circuit Court of the U. S. for the District of Kansas, Nov. Term, 1881.

The United States *ex rel.* Clarence F. Moulton
vs.
The Board of County Com'rs of Labette county, Kansas, *et al.*

Demurrer.

Now come the respondents, by their attorney, B. W. Perkins, and jointly and severally demur to the alternative writ of mandamus

heretofore issued herein, and ask that the same be quashed and set aside for the reasons following, to wit:

I. Because the court has no jurisdiction of the persons of the respondents, or the subject of the acting.

II. Because of defect of parties defendants.

III. Because several*ly* causes of action are improperly joined.

IV. Because the writ does not state facts sufficient to entitle the relator to the relief demanded against the respondents.

Wherefore the respondents ask to be discharged with their costs.

B. W. PERKINS,
Att'y for Respondents.

(Endorsed): In the U. S. Circuit Court for the Dist. of Kansas, No. 1992. The U. S. *ex rel.* Clarence F. Moulton *vs.* The Board 19 of County Com'rs of Labette county, Kansas, and others. Demurrer to alternative writ of mandamus. Filed Nov. 29, 1881. A. S. Thomas, clerk.

B. W. PERKINS,
Att'y for Respondents.

20 United States *ex rel.* Clarence F. Moulton
1992 *vs.*
The Board of County Commissioners of Labette county, Kansas.

The defendant's demurrer to the alternative writ of mandamus herein came on to be heard, and was argued by counsel; on consideration whereof it is ordered by the court that said demurrer be, and is hereby, overruled, and on motion of said relator it is ordered by the court that a peremptory writ of mandamus be, and is now, here allowed and ordered to issue herein against the defendants and officers thereof, returnable to November term, 1882. To which ruling, decision, and order of the court the defendant excepts.

21 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the District of Kansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said Circuit Court before you, between the United States of America on the relation of Clarence F. Moulton and the Board of County Commissioners of Labette county, Kansas, and the Clerk of said Board, and the Clerk of said county of Labette, and the Treasurer of said county of Labette, State of Kansas, a manifest error hath happened, to the great damage of the said defendants, as by this complaint appears.

We, being willing that error, if any hath been, should be duly

corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held. That the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this
[SEAL.] 10th day of April, A. D. 1882.

A. S. THOMAS,
Clerk of the Circuit Court of the U. S. for the District of Kansas.

22 Know all men by these presents, that we, the Board of County Commissioners of Labette county, Kansas, and the Clerk of such Board, and the Clerk and Treasurer of Labette county, Kansas, as principals, and C. M. Condon and C. O. Perkins, as sureties, are held and firmly bound unto Clarence F. Moulton in the full and just sum of five hundred dollars, to be paid to the said Clarence F. Moulton, his certain attorney, executor, administrator or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators or assigns, jointly and severally, by these presents. Sealed with our seals, and dated this 10th day of April, 1882.

Whereas lately, at a term of the Circuit Court of the United States of America, for the 8th circuit and district of Kansas, in a suit depending in said court between the United States of America on the relation of Clarence F. Moulton against the Board of County Commissioners of Labette county, State of Kansas, and the Clerk of such Board, and the Clerk and Treasurer of said Labette county, Kansas, judgment was rendered against the said defendants, and the said defendants having obtained a writ of error, and filed a
23 copy thereof in the clerk's office of the said court, to reverse the judgment rendered in said suit, and a citation directed to the said Clarence F. Moulton citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of October next:

Now, the condition of the above obligation is such, that if the said Board of County Commissioners of Labette county, Kansas, and the Clerk of such Board, and the Clerk and Treasurer of said county of Labette, Kansas, defendants, shall prosecute their writ of error to effect, and answer all damages and costs if they shall fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

In witness whereof we have hereunto set our hands the day and year above written.

THE BOARD OF COUNTY COMMISSIONERS OF LABETTE COUNTY, KANSAS, AND THE CLERK OF SUCH BOARD, AND THE CLERK AND TREASURER OF LABETTE COUNTY, STATE OF KANSAS, BY THEIR ATT'Y.

B. W. PERKINS.
C. M. CONDON.
C. O. PERKINS.

Approved: C. G. FOSTER, Judge.

24 The United States of America to Clarence F. Moulton, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States in and for the district of Kansas, in the 8th circuit, wherein the Board of County Commissioners of Labette county, Kansas, and the Clerk of such Board, and the Clerk and Treasurer of said Labette county, State of Kansas, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error contained, should not be done to the parties in that behalf.

Given under my hand at the city of Topeka, in the district of Kansas, in the 8th circuit, the 10th day of April, 1882.

C. G. FOSTER,
U. S. District Judge.

25 Service admitted.
June 8, '82.

BROWN & CAMPBELL,
Att'ys for Relator.

(Endorsed:) No. 1992. Citation. Filed June 8, 1882. A. S. Thomas, clerk. By Geo. N. Holmes, deputy.

26 1992.

The U. S. *ex rel.* Clarence F. Moulton
vs.
The Board of County Com'rs of Labette County, Kansas, *et al.*

Precipe.

Please make copies of the petition for the alternative writ of mandamus filed June 10, 1881; the writ filed on the 27th day of

July, 1881; the demurrer thereto filed Nov. 29, 1881, and the judg't of the court overruling the demurrer and granting a peremptory writ of mandamus, and send to me at Oswego.

B. W. PERKINS,
Att'y for Def'ts.

(Endorsed:) 1992. Filed April 11, 1882. A. S. Thomas, clerk.

27 UNITED STATES OF AMERICA, }
District of Kansas, } *ss:*

I, A. S. Thomas, clerk of the Circuit Court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and perfect copy from the record and papers of said court in an action wherein the United States of America *ex relatione* Clarence F. Moulton is plaintiff and the Board of County Commissioners of Labette county, Kansas, the Clerk of said Board and the Clerk of said county of Labette, and the Treasurer of said county of Labette, State of Kansas, are defendants, No. 1992 in said court, asked for in the precipe hereto attached.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in Topeka, in said district of Kansas, this 28th day of April, A. D. 1882.

[SEAL.] A. S. THOMAS, *Clerk.*
By GEO. N. HOLMES, *Deputy.*

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BURGOYNE (Law Tel. 587), 57, 59 & 61 Park St.

1

IN THE

CIRCUIT COURT OF THE UNITED STATES,

DISTRICT OF KANSAS.

2

The United States of America, ex relatione Clarence F. Moulton vs. The Board of County Commissioners of Labette County, State of Kansas, and Trustees of Oswego Township, in said County of Labette.	Information for Mandamus.

3

To the Honorable Judges of said Court:

Your relator, Clarence F. Moulton, represents and shows unto your Honors, that heretofore, to wit, on the 7th day of June, A. D. 1877, he recovered, by the consideration of this Court, a judgment in a cause theretofore depending in this Court, 4 wherein your relator was plaintiff and the said the Township of Oswego, in the County of Labette, State of Kansas, was defendant, for the sum of $9,221.34, debt, and $52.69 costs, which said judgment bears interest at the rate of seven per cent. per annum, and is still wholly unsatisfied and of full force and effect and not in any wise reversed, vacated or superseded.

That the said defendant therein is and was at the date aforesaid a corporation organized and existing

5 under the laws of the State of Kansas, for public purposes, and upon the rendition of the said judgment it became and was the duty of the said the Board of County Commissioners of the County of Labette, in the State of Kansas, and Trustees as aforesaid, to levy and collect and pay over a tax upon the taxable property of said township sufficient to pay the judgment and interest and costs.

That heretofore, to wit, on the 26th day of July, A. D. 1877, your relator demanded of the Board of
6 County Commissioners of the said Labette County and Trustees as aforesaid, the performance of that duty, that is to say, that they forthwith levy and in due course collect and pay over to your relator upon the taxable property of said township, a sufficient tax to satisfy the above mentioned judgment and interest and costs.

That the said defendants have hitherto neglected and refused to perform their said duty and to levy the said tax.

7 Wherefore, and inasmuch as your orator is without a plain and adequate remedy in the plain and ordinary course of the law, he prays that the writ of mandamus of this Court may issue in due form commanding the performance of the said duty by the said board.

And he will ever pray.

CLARENCE F. MOULTON,
Relator,
By BROWN & CAMPBELL,
8 His Attorneys.

UNITED STATES OF AMERICA,)
District of Iowa.) ss.:

I, JAMES D. CAMPBELL, being duly sworn, do say that I am a member of the firm of Brown & Campbell, the attorneys for the plaintiff in the above entitled cause; that I have read the foregoing information, and that the statements thereof are true as I verily believe, and that I know the facts from having had

personal charge of the suit, and trial, and judgment, and said demand, and the proceedings in Court. 9

J. D. CAMPBELL.

Subscribed and sworn to by the said James D. Campbell this 13th day of August, A. D. 1877.

S. E. BROWN,
U. S. Com'r.,
Dist. of Iowa.

10

IN THE CIRCUIT COURT OF THE UNITED STATES,

DISTRICT OF KANSAS.

THE UNITED STATES, EX. REL. CLARENCE F. MOULTON

vs.

11

THE BOARD OF COUNTY COMMISSIONERS OF LABETTE COUNTY, STATE OF KANSAS, and TRUSTEES OF OSWEGO TOWNSHIP IN SAID COUNTY. } Motion.

Comes now the relator above named and upon the attached information and affidavit moves for a writ of mandamus as prayed in and by said petition. 12

CLARENCE F. MOULTON,
Relator.
By BROWN & CAMPBELL,
His Attorneys.

No. 1992. The United States of America *ex relatione* Clarence F. Moulton vs. Board of County Commissioners of Labette County and Trustees of Oswego Township. Information for mandamus. Filed August 15, 1877. A. S. Thomas, Clerk.

13 UNITED STATES OF AMERICA, } ss.
District of Kansas. }

At a Term of the Circuit Court of the United States of America, for the District of Kansas, begun and held at the City of Leavenworth, in said district, on Monday, the 4th day of June, 1877, proceedings were had, and appear of record, in words and figures following, to wit:

14

TUESDAY, October, 9, 1877.

THE UNITED STATES OF AMERICA EX RELATIONE CLARENCE F. MOULTON

1992 VS.

15 THE BOARD OF COUNTY COMMISSIONERS OF LABETTE COUNTY, STATE OF KANSAS, and TRUSTEES OF OSWEGO TOWNSHIP, IN SAID COUNTY OF LABETTE.

And now comes said Clarence F. Moulton, by Brown & Campbell, his attorneys, and presents to the Court his petition and affidavit filed herein for a writ of mandamus to and against said defendant,
16 the Board of County Commissioners of the County of Labette, and Trustees of Oswego Township, in said County of Labette, in the State of Kansas, on consideration whereof it is ordered by the Court that an alternative writ of mandamus be, and is now here allowed and ordered to issue to and against the County Commissioners of the County of Labette, and Trustees of Oswego Township, in said County of Labette, in the State of Kansas, commanding it immediately upon the receipt of such writ to levy a tax on all property subject to taxation

for any of the purposes herein in said petition mentioned, and on all the taxable property in said Oswego Township, in the County of Labette, in the State of Kansas, sufficient in amount for the payment of the judgment, interest and costs, in said petition set forth, and for the purpose of and to provide funds for the payment of the said judgment, or to appear and show cause before the Circuit Court of the United States of America, in and for the District of Kansas, to be held before the Judges of said Court, at Topeka, in said district, on Monday, the 26th day of November, 1877, why it has not done so, and that it then and there return such writ, with its certificate of having done as thereby commanded.

CIRCUIT COURT OF THE UNITED STATES, District of Kansas, } ss.:

THE UNITED STATES OF AMERICA EX RELATIONE CLARENCE F. MOULTON

vs.

THE BOARD OF COUNTY COMMISSIONERS OF LABETTE COUNTY, STATE OF KANSAS, AND TRUSTEES OF OSWEGO TOWNSHIP, IN SAID COUNTY OF LABETTE.

No. 1992.

THE UNITED STATES OF AMERICA TO THE BOARD OF COUNTY COMMISSIONERS OF LABETTE COUNTY, STATE OF KANSAS, AND TRUSTEES OF OSWEGO TOWNSHIP, IN SAID COUNTY OF LABETTE, GREETING:

Whereas, it has been suggested to us that you have neglected and refused to levy a tax, collect and pay over and satisfy a judgment obtained before

said Court on the 7th day of June, 1877, by said Clarence F. Moulton against Oswego Township, in Labette County, State of Kansas, for the sum of nine thousand two hundred and twenty-one dollars and thirty-four cents, together with interest thereon at the rate of seven per cent. per annum from date of said judgment until paid, and also for costs in that behalf expended, which costs now amount to the sum of fifty-two dollars and sixty-nine cents, which said judgment is now in full force and effect, in nowise modified, vacated nor reserved, and the said judgment is wholly unsatisfied and unpaid.

Now, therefore, we being willing that full and speedy justice should be done in the premises do command you, the Board of County Commissioners of Labette County, in the State of Kansas, and Trustees of Oswego Township, in said County of Labette, to immediately, upon the receipt of this writ, levy a tax on all property subject to taxation for any of the purposes herein mentioned and on all taxable property in Oswego Township, in said County of Labette, in the State of Kansas, sufficient in amount for the payment of the judgment, interest and costs aforesaid, and for the purpose of and to provide funds for the payment of the same, or to appear and show cause before the Circuit Court of the United States of America in and for the District of Kansas, to be held before the Judges of said Court at Topeka, in said district, on Monday, the 26th day of November, 1877, why you have not done so. And that you then and there return this suit with your certificate of having done as you are hereby commanded.

Witness, Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, with the seal of said Circuit Court affixed at Topeka, in said district, this 9th day of October, 1877.

Seal of said Court.

A. S. THOMAS,
Clerk.

UNITED STATES OF AMERICA, } ss.: 25
District of Kansas, }

I, CHARLES H. MILLER, Marshal of the United States for the District of Kansas, do hereby certify the within and foregoing to be a true, full and perfect copy of the original mandamus now in my possession, with all endorsements thereon.

CHAS. H. MILLER,
U. S. Marshal for the District of Kansas.
By S. B. ABBOTT,
Deputy. 26

UNITED STATES OF AMERICA, } ss.:
District of Kansas, }

This, the within writ, is allowed by the Circuit Court of the United States for the District of Kansas, this 9th day of October, 1877.

C. G. FOSTER,
Judge.

[ENDORSED:] 27

No, 1992. The United States of America *ex relatione* Clarence F. Moulton vs. The Board of County Commissioners of Labette County, State of Kansas, and Trustees of Oswego Township, in said County of Labette. Mandamus. Filed, Nov. 26, 1877. A. S. Thomas, Clerk.

U. S. MARSHAL'S RETURN, } ss.:
District of Kansas, }

I received an original writ of mandamus of which, 28
and the endorsements thereon, the within and hereto annexed is a copy, on the 17th day of October, A. D. 1877, at 5 o'clock P. M. of that day, and I have served the same in the County of Labette, in the State of Kansas, on the Board of County Commissioners of the County of Labette, in the State of Kansas, and on the therein named W. A. Starr, Christian Lieb and D. J. Doolan, the members of said Board of County Commissioners, and on E. D. Bevens Trustee of Oswego Township, in said La-

bette County, by exhibiting and showing said writ of mandamus, and the seal thereto affixed of the therein mentioned Circuit Court of the United States for the District of Kansas, and the allowance of said writ thereon endorsed, to said W. A. Starr and by delivering to him, the said W. A. Starr, personally a copy of said writ of mandamus, with all the endorsements thereon, on the 8th day of November, A. D. 1877, and by exhibiting and showing said writ of mandamus, and the seal of said Court thereto affixed, and said allowance of said writ thereon endorsed, to said Christian Lieb and by delivering to him, the said Christian Lieb, personally, a copy of said writ of mandamus with all the endorsements thereon, on the 8th day of November, A. D. 1877, and by exhibiting and showing said writ of mandamus, and the seal of said Court thereto affixed, and the allowance of said writ thereon endorsed to L. C. Howard, the County Clerk of said County of Labette and the Clerk of said Board of County Commissioners, and by delivering to him, the said L. C. Howard, personally, as such Clerk, a copy of said writ of mandamus, with all of the endorsements thereon, on the 8th day of November, A. D. 1877, and by delivering said original writ of mandamus to said D. J. Doolan personally on the 8th day of November, A. D. 1877, he at that time being the Chairman of said Board of County Commissioners of the County of Labette aforesaid. I did also on the 14th day of November, 1877, at said Labette County, deliver a like copy of said writ of mandamus to E. D. Bevens personally, he, said E. D. Bevens, being the Trustee of said Oswego Township, Labette County.

CHAS. F. MILLER,
U. S. Marshal for the District of Kansas.
By S. B. ABBOTT,
Deputy.

Marshal's fees $24.50.

UNITED STATES OF AMERICA, } ss.: 33
District of Kansas, }

At a Term of the Circuit Court of the United States of America, for the District of Kansas, begun and held at the City of Topeka, in said district, on Monday, the 26th day of November, 1877, proceedings were had, and appear of record, in words and figures following, to wit:

MONDAY, Dec. 10, 1877.

34

UNITED STATES OF AMERICA EX REL. CLARENCE F. MOULTON

1992 VS.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LABETTE.

Now comes the relator herein by Brown & Campbell, his attorneys, and his motion for an order to quash the alternative writ of mandamus heretofore allowed and issued herein, and for a further order for the allowance of an alternative writ now here presented, on consideration whereof, the Court do grant said motion; it is therefore ordered by the Court that said alternative writ heretofore allowed and issued herein be, and the same is hereby, quashed and set aside. 35

36

U. S. MARSHALS' RETURN, } ss.:
District of Kansas, }

Received the original writ of mandamus, of which the hereto attached is a true copy, April 1st, A. D. 1878, and for my return of the same, I certify that I executed the same at Labette County, State and District of Kansas, on the 15th day of April, A. D. 1878, by serving the same on the within-named defendant, the Board of County Commissioners of the

County of Labette, State of Kansas, at and while said board were then and there in session, to wit, by delivering personally to each, H. M. Debolt and P. W. Shick, members of said board, and to L. C. Howard, County Clerk of Labette County, Kansas, and Clerk of said Board of Commissioners, a true and certified copy of said original alternative writ of mandamus, and at the same time exhibiting to each of said members and clerks the said original writ, together with the seal of this Honorable Court thereto affixed; I then at the same time and place delivered to H. S. Coley personally the said original alternative writ of mandamus, he, the said H. S. Coley, being then and there the Chairman of the Board of County Commissioners of Labette County, Kansas, the defendant herein.

CHAS. H. MILLER,
U. S. Marshal, Dist. of Kans.,
by S. B. ABBOTT,
Deputy.

Marshals' fees $25.00.

IN THE CIRCUIT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF KANSAS.

THE UNITED STATES OF AMERICA TO THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LABETTE:

Whereas, on the 7th day of June, A. D. 1877, by the consideration of the Honorable the Circuit Court of the United States, for the District of Kansas, in a certain action then therein depending, wherein a certain Clarence F. Moulton was plaintiff, and Oswego Township, in the County of Labette and State of Kansas, was defendant, the said plaintiff recovered of and against the said defendant the sum of nine thousand two hundred and twenty-one dollars and thirty-four cents, with interest thereon at the rate of seven per cent. per annum from the date of

the said judgment, and the further sum of fifty-two 41
dollars and sixty-nine cents, cash, the same being for so much money then and there due and owing to the said plaintiff, from the said defendant, upon divers coupons or interest warrants representing the annual instalments of interest before that time accruing upon sundry bonds theretofore caused to be issued in the name and on behalf of the said Oswego Township, by the Board of County Commissioners of the County of Labette, pursuant to the provisions of an Act of the Legislature of the State of Kansas, 42
entitled, "An Act to enable municipal townships to subscribe for stock in any railroad and to provide for the payment of the same," approved February 25, 1870, and which said bonds are payable to the Missouri, Kansas and Texas Railway Company, or bearer; the said judgment being now in full force and effect and in nowise modified or reversed, all of which will more fully appear from the record thereof still remaining in our said Circuit Court.

And whereas, by the terms of the said act, at and 43
after the issuance of the said bonds it became and was the duty of the said Board of County Commissions of the County of Labette annually to proceed to levy and collect a tax on all the taxable property in said Oswego Township, sufficient to pay the interest so accruing upon the said bonds and so recovered by the said Clarence F. Moulton as aforesaid, as the same became due.

And whereas, after the rendition of the said judg- 44
ment, and before the sixth day of August, A. D. 1877, the said Clarence F. Moulton demanded of the said Board of County Commissioners of the said County of Labette that it proceed to levy and collect a tax on all the taxable property in said Oswego Township sufficient to pay the said judgment, interest and costs, in conformity to the provisions of the statute in such case made and provided.

And whereas, it hath been made to appear unto our said Circuit Court, on the relation of the said Clarence F. Moulton, that you, the said Board of

45 County Commissioners of the County of Labette, notwithstanding the premises, have neglected and refused to levy and collect the tax aforesaid, and that the said relator hath no plain or adequate remedy in the premises, according to the ordinary course of law.

Now, therefore, we being willing that full and speedy justice should be done in the premises, and in order for the allowance of this writ having been duly made and entered in our said Circuit Court, do
46 command you, the said Board of County Commissioners of the County of Labette, that you do levy and collect a sufficient tax upon all the taxable property in Oswego Township in the County of Labette, and State of Kansas, to pay the above recited judgment, interest and costs, and that you cause the said moneys to be paid over to the said Clarence F. Moulton upon the said judgment or that you show cause before our said Circuit Court at the next Term thereof to be held at Leavenworth, in the said dis-
47 trict, on the first Monday in June, 1878, why you have not done so, and that you have then there this writ.

Witness, the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, with the seal of our said Circuit Court at Topeka, in the said district, this 10th day of December, A. D. 1877.

[SEAL.]

A. S. THOMAS,
Clerk.

48

And now, 10th December, 1877, it being at the November Term, 1877, of the said Court, it is considered by the Circuit Court of the United States for the District of Kansas, and ordered, that the above and foregoing writ of mandamus be and the same is hereby allowed, and that this order be spread upon the records of the said Court.

C. G. FOSTER,
Judge.

[ENDORSED:] 49

No. 1992. In the United States Circuit Court. United States of America *ex relatione* Clarence F. Moulton vs. The Board of County Commissioners of the County of Labette.

Alternative writ of mandamus and attachment.

Filed April 25, 1878.

A. S. THOMAS,
Clerk.

50

IN THE CIRCUIT COURT OE THE UNITED STATES.

DISTRICT OF KANSAS.

UNITED STATES EX REL. CLARENCE F. MOULTON vs. BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LABETTE.	No. 1992 Motion.	51

And now comes the relator, and moves the Court for an order quashing the alternative writ of mandamus heretofore allowed and issued herein, and for a further order for the allowance of the alternative writ herewith presented. 52

BROWN & CAMPBELL,
Attorneys for Relator.

[ENDORSED:]

No. 1992. In the Unites Stated Circuit Court. United States *ex rel.* Clarence F. Moulton vs. Board of County Commissioners of the County of Labette. Motion. Filed Dec. 10, 1877. A. S. Thomas, Clerk. Brown & Campbell.

County Commissioners of the County of Labette, notwithstanding the premises, have neglected and refused to levy and collect the tax aforesaid, and that the said relator hath no plain or adequate remedy in the premises, according to the ordinary course of law.

Now, therefore, we being willing that full and speedy justice should be done in the premises, and in order for the allowance of this writ having been duly made and entered in our said Circuit Court, do command you, the said Board of County Commissioners of the County of Labette, that you do levy and collect a sufficient tax upon all the taxable property in Oswego Township in the County of Labette, and State of Kansas, to pay the above recited judgment, interest and costs, and that you cause the said moneys to be paid over to the said Clarence F. Moulton upon the said judgment or that you show cause before our said Circuit Court at the next Term thereof to be held at Leavenworth, in the said district, on the first Monday in June, 1878, why you have not done so, and that you have then there this writ.

Witness, the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, with the seal of our said Circuit Court at Topeka, in the said district, this 10th day of December, A. D. 1877.

SEAL.

A. S. THOMAS,
Clerk.

And now, 10th December, 1877, it being at the November Term, 1877, of the said Court, it is considered by the Circuit Court of the United States for the District of Kansas, and ordered, that the above and foregoing writ of mandamus be and the same is hereby allowed, and that this order be spread upon the records of the said Court.

C. G. FOSTER,
Judge.

[ENDORSED:] 49

No. 1992. In the United States Circuit Court. United States of America *ex relatione* Clarence F. Moulton vs. The Board of County Commissioners of the County of Labette.

Alternative writ of mandamus and attachment. Filed April 25, 1878.

A. S. THOMAS,
Clerk.

50

IN THE CIRCUIT COURT OE THE UNITED STATES.

DISTRICT OF KANSAS.

UNITED STATES EX REL. CLARENCE F. MOULTON vs. BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LABETTE.	No. 1992 Motion.	51

And now comes the relator, and moves the Court for an order quashing the alternative writ of mandamus heretofore allowed and issued herein, and for a further order for the allowance of the alternative writ herewith presented. 52

BROWN & CAMPBELL,
Attorneys for Relator.

[ENDORSED:]

No. 1992. In the Unites Stated Circuit Court. United States *ex rel.* Clarence F. Moulton vs. Board of County Commissioners of the County of Labette. Motion. Filed Dec. 10, 1877. A. S. Thomas, Clerk. Brown & Campbell.

53 IN THE U. S. CIRCUIT COURT,

FOR THE DISTRICT OF KANSAS.

THE U. S. EX REL. CLARENCE F. MOULTON

vs.

THE BOARD OF CO. COMMISSIONERS OF LABETTE COUNTY, KANSAS.

54

Now come the said defendants by their attorney, B. W. Perkins, and for answer to the alternative writ of mandamus heretofore granted herein, say that they have not obeyed the mandates of the said writ as therein commanded, for the reason:

FIRST. That the time has not yet arrived when the taxes for the year 1878 can be legally levied.

SECOND. And for the further reason that they 55 cannot legally levy the said taxes without the assistance and coöperation of the Trustee of the said Township of Oswego, and such Trustee refuses to coöperate with us or assist us in such levy. Wherefore, your respondents ask to be discharged with their costs.

B. W. PERKINS,
Attorney for defendants.

56 In the U. S. Circuit Court, District of Kansas. No. 1992. The U. S. *ex rel.* Clarence Moulton vs. the Board of Co. Commissioners, Labette County, Kansas. Answer to alternative writ of mandamus. Filed June 6, 1878. A. S. Thomas, clerk, by J. N. Strickler, deputy. B. W. Perkins, attorney for defendants.

57

IN U. S. COURT,

KANSAS.

U. S. EX REL. C. F. MOULTON

vs.

THE BOARD, &C., OF LABETTE CO., AND TRUSTEE OF OSWEGO TOWNSHIP.

Demurrer. 58

The relator demurs to the return to the alternative writ here, and says the same is insufficient in law.

The judgment mandamus should be entered commanding the levy at next period fixed by law for levy. The board only can levy the tax under the 59 law and the acts under which such bonds were issued, and the terms bonds.

BROWN & CAMPBELL,
For Relator.

No. 1992. 134 U. S. *ex rel.* Moulton vs. Bd. Co. Com. Labette, trustee. Demurrer filed June 10, 1878. A. S. Thomas, clerk. By J. N. Strickler, deputy. Brown & Campbell.

60

61 UNITED STATES OF AMERICA, } ss.:
District of Kansas, }

At a Term of the Circuit Court of the United States of America, for the District of Kansas, begun and held at the City of Leavenworth, in said district, on Monday, the 3d day of June, 1878, proceedings were had, and appear of record, in words and figures following, to wit:

62 MONDAY, June 10, 1878.

UNITED STATES EX REL. CLARENCE F. MOULTON

1992 vs.

THE BOARD OF COUNTY COMMISSIONERS OF LABETTE COUNTY,
63 KANSAS, AND TRUSTEE OF OSWEGO TOWNSHIP IN SAID COUNTY OF LABETTE.

Now comes the relator herein by Brown & Campbell, his attorneys, and the respondents by B. W. Perkins, their attorney, and the relator's demurrer to the respondents' return to the alternative writ of mandamus came on to be heard and was
64 argued by counsel; on consideration whereof, it is ordered by the Court that said demurrer be, and the same is hereby sustained, and a peremptory writ of mandamus be and is now here allowed and ordered to issue to and against the Board of County Commissioners of the County of Labette, in the State of Kansas, commanding it to levy and collect a sufficient tax upon all the taxable property in Oswego Township in the County of Labette, and State of Kansas, when other taxes are levied, to pay the judgment, interest and costs in the petition herein

set forth, and that it cause the same to be paid over 65
to the relator on said judgment.

U. S. MARSHAL'S RETURN, DISTRICT OF KANSAS.

I certify, that I served the original writ of mandamus, of which the hereto attached is a true copy, on the Board of County Commissioners of the County of Labette, State of Kansas, on the fifth day of August, 1878, at the County of Labette, State and District of Kansas, by delivery to H. M. Debolt and P. W. Shick, each of them personally, a true 66
and certified copy of the said original writ of mandamus, and at the same time and place showing each of them the said original writ, with the seal of this Honorable Court attached, the said H. M. Debolt and P. W. Shick being then and there members of the said Board of Commissioners of the County of Labette, State of Kansas; I did also at the same time and place serve a like copy upon L. C. Howard, by delivering to him personally a copy, showing him a certified copy of this writ, and also at 67
the same time and place the original, with the seal of the said Court attached, he, the said L. C. Howard, being then and there the clerk of said County of Labette. I thereafter on the same day and at the same place delivered to H. S. Coly, personally, the said original writ of mandamus, he, the said H. S. Coly, being then and there the chairman of said Board of Commissioners at which time said Board of Commissioners were in session.

B. F. SIMPSON, 68
Marshal Dist. Kansas.

Marshal's fees and expenses, $39.70.

69

IN THE CIRCUIT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF KANSAS.

THE UNITED STATES OF AMERICA. TO THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LABETTE:

Whereas, on the 7th day of June, A. D. 1877, by the consideration of the Honorable the Circuit
70 Court of the United States, for the District of Kansas, in a certain action then therein depending, wherein a certain Clarence F. Moulton was plaintiff, and Oswego Township, in the County of Labette and State of Kansas, was defendant, the said plaintiff recovered of and against the said defendant, the sum of nine thousand two hundred and twenty-one dollars and thirty-four cents, with interest thereon at the rate of seven per cent. per annum from the date of said judgment, and the further sum of one
71 hundred and nine $\frac{69}{100}$ dollars costs, the same being for so much money then and there due and owing to the said plaintiff for the said defendant upon divers coupons or interest warrants representing the annual instalments of interests before that time accruing upon sundry bonds theretofore caused to be issued in the name and on behalf of the said Oswego Township by the Board of County Commissioners of the County of Labette, pursuant to the provisions of an act of the Legislature of the State
72 of Kansas, entitled "An act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same," appeared February 25th, 1870, and which said bonds are payable to the Missouri, Kansas and Texas Railway Company, or bearer, the said judgment being now in full force and effect and in no wise modified or reversed, all of which more fully appears from the records thereof still remaining in our said Circuit Court.

And whereas, by the terms of the said act at and after the issuance of the said bonds, it became and was the duty of the said Board of County Commissioners of the County of Labette annually to proceed to levy and collect a tax on all the taxable property in said Oswego Township, sufficient to pay the interest so accruing upon the said bonds, and so recovered by the said Clarence F. Moulton, as aforesaid, as the same became due. 73

And whereas, after the rendition of the said judgment and before the sixth day of August, A. D. 1877, the said Clarence F. Moulton demanded of the said Board of County Commissioners of the said County of Labette, that it proceeds to levy and collect a tax on all the taxable property in said Oswego Township sufficient to pay the said judgment, interest and costs in conformity to the provisions of the statutes in such cases made and provided. 74

And whereas, it has been made to appear unto our said Circuit Court, on the relation of the said Clarence F. Moulton, that you, the said Board of County Commissioners of the County of Labette, notwithstanding the premises have neglected and refused to levy and collect the tax aforesaid, and that the said relator hath no plain or adequate remedy in the premises according to the ordinary course of law. 75

Now, therefore we, being willing that full and speedy justice should be done in the premises, and an order for the allowance of this writ having been duly made and entered in our said Circuit Court, do command you, the said Board of County Commissioners of the County of Labette, that you do levy and collect a sufficient tax upon all the taxable property in Oswego Township, in the County of Labette and State of Kansas, to pay the above-named judgment, interest and costs, and that you cause the said moneys to be paid over to the said 76

77 Clarence F. Moulton upon the said judgment. Hereof, fail not.

Witness, the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, with the seal of said Circuit Court affixed at Topeka, in said District, this second day of August, A. D. 1878.

Seal of said Court.

A. S. THOMAS,
Clerk.

78

THE UNITED STATES OF AMERICA, District of Kansas, } ss.:

This, the above writ of mandamus, allowed by the Circuit Court of the United States for the District of Kansas, this the 10th day of June, A. D. 1878.

C. G. FOSTER,
Judge.

79

UNITED STATES OF AMERICA, District of Kansas, } ss.:

I, B. F. SIMPSON, Marshal of the United States for the District of Kansas, do hereby certify the within and foregoing to be a true, full and perfect copy of the original peremptory writ of mandamus, now in my possession, with all the endorsements thereon.

B. F. SIMPSON,
Marshal,
District of Kansas.

80

By J. H. SMITH,
Deputy.

[ENDORSED:]

No. 1992. The United States *ex relatione* Clarence F. Moulton vs. The Board of County Commissioners of Labette County, State of Kansas, and Trustee of Oswego Township in said County of Labette. Peremptory Writ of Mandamus. Filed August 14, 1878. A. S. Thomas, Clerk. By J. N. Strickler, Deputy.

81

UNITED STATES OF AMERICA, } ss.:
District of Kansas, }

At a Term of the Circuit Court of the United States of America, for the District of Kansas, begun and held at the City of Topeka, in said district, on Monday, the 25th day of November, 1878, proceedings were had, and appear of record, in words and figures following, to wit: 82

THURSDAY, March 6, 1879.

UNITED STATES EX REL. CLARENCE F. MOULTON

1992. vs.

THE BOARD OF COUNTY COMMISSIONERS OF LABETTE COUNTY, KANSAS, and TRUSTEES OF OSWEGO TOWNSHIP, IN SAID COUNTY OF LABETTE. 83

On motion of relator herein, by his counsel, it is ordered by the Court that the defendants show cause, by the first day of next Term of this Court, why an attachment should not issue against them, and the officers, members and persons of said defendant, for not obeying the writs issued herein. 84

85 And on this day, to wit, June 9, 1879, being at the June Term, 1879, of said Court, in the record of the proceedings thereof is the following entry, to wit:

	UNITED STATES EX REL. CLARENCE F. MOULTON
1992.	VS.
86	THE BOARD OF COUNTY COMMISSIONERS OF LABETTE COUNTY, KANSAS, and TRUSTEES OF OSWEGO TOWNSHIP, IN SAID COUNTY OF LABETTE.

It is ordered by the Court that this action be and it is hereby continued to the next Term of this
87 Court.

IN THE U. S. CIRCUIT COURT

FOR THE DISTRICT OF KANSAS.

	UNITED STATES EX REL. CLARENCE F. MOULTON
88	VS.
	THE BOARD OF COUNTY COMMISSIONERS OF LABETTE COUNTY, KANSAS, and TRUSTEES OF OSWEGO TOWNSHIP.

Now come the said defendants, the Board of County Commissioners of Labette County, Kansas, by their attorney, B. W. Perkins, and in answer to the peremptory writ of mandamus allowed and

served herein they would say that, as commanded by the said writ of mandamus, they did, on the 20th day of August, 1878, and during the regular session of their said Board for said month of August, levy a tax of eight cents and five mills upon each dollar of taxable property in the said Township of Oswego, which tax, so levied upon the said taxable property of the said township, aggregated the sum of $10,138.33, an amount sufficient to satisfy and pay off the judgment of the said Clarence F. Moulton, together with the accrued interest and costs, and they further ordered that the tax so levied by them be entered upon the tax-rolls and collected as other taxes are entered and collected.

And the said Board of County Commissioners having done all things as commanded in the said writ, and having shown by this return their proceedings thereunder, ask to be discharged, with their costs, from further liability herein.

THE BOARD OF COUNTY COMMISSIONERS OF
LABETTE COUNTY, KANSAS,
Respondents.
By their Attorney, B. W. PERKINS.

[ENDORSED:]

No. 1992. U. S. *ex rel.* Clarence F. Moulton vs. The Board of County Commissioners of Labette County, Kans., and Trustees of Oswego Township. Return to peremptory writ of mandamus. Filed November 25, 1879. A. S. Thomas, Clerk. B. W. Perkins, attorney for respondents.

93

UNITED STATES OF AMERICA, }
District of Kansas, } ss.:

At a Term of the Circuit Court of the United States of America, for the District of Kansas, begun and held at the City of Topeka, in said district, on Monday, the 24th day of November, 1879, proceedings were
94 had, and appear of record, in words and figures following, to wit:

FRIDAY, November 28, 1879.

UNITED STATES EX REL. CLARENCE F. MOULTON

1992. vs.

95 THE BOARD OF COUNTY COMMISSIONERS OF LABETTE COUNTY, KANSAS, and TRUSTEES OF OSWEGO TOWNSHIP.

This cause coming on to be heard on the application of the relator for a rule upon respondents to show cause why they should not be committed for contempt. Ordered, after argument of counsel,
96 that a rule issue, returnable to the June Term, requiring respondents to show cause why they should not be committed for contempt.

97

IN THE CIRCUIT COURT OF THE UNITED STATES,

DISTRICT OF KANSAS.

THE UNITED STATES EX RELATIONE CLARENCE F. MOULTON

No. 1992. vs.

THE BOARD OF COUNTY COMMISSIONERS OF LABETTE COUNTY, KANSAS, TRUSTEE OF OSWEGO TOWNSHIP.

98

TO THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LABETTE, KANSAS, TRUSTEES' ACT: 99

This cause coming on to be heard on the application of the relator for a rule upon the said Board of County Commissioners of Labette County to show cause why they should not be committed for contempt, the relator, appearing by Brown & Campbell, his attorneys, and the respondents, the said board, by Hon. B. W. Perkins, its attorney, and the Court having heard the arguments of counsel and having ordered that the rule issue as prayed: Therefore, you, the said Board of County Commissioners of Labette 100 County, Kansas, are hereby ordered and directed to be and appear in your own proper persons before the Circuit Court of the United States in and for the District of Kansas, on the first day of the next Term thereof, appointed to be begun and holden at Leavenworth, in said District of Kansas, on the first Monday of June, 1880, and then and there show cause, if any you have, why you should not be committed for contempt of Court for not obey-

101 ing the peremptory writ of mandamus heretofore issued herein.

C. G. FOSTER,
Judge.

Attest:
A. S. THOMAS,
[SEAL.] Clerk.

Service of the within rule accepted and acknowledged for the Board of County Commissioners of
102 Labette County, Kansas, this 11th day of December, 1879, by their attorney,

B. W. PERKINS.

No. 1992. In U. S. Circuit Court, U. S. ex rel. C. F. Moulton vs. The Board, &c., of Labette Co. Rule to show cause. Filed Dec. 13, 1879. A. S. Thomas, Clerk. By J. N. Strickler, Deputy.

103

IN THE U. S. CIRCUIT COURT,
DISTRICT OF KANSAS.

THE UNITED STATES EX RELATIONE
CLARENCE F. MOULTON

vs.

104 THE BOARD OF COUNTY COMMISSIONERS OF LABETTE COUNTY and TRUSTEE OF OSWEGO TOWNSHIP.

Now comes the Board of County Commisssoners of Labette County, Kansas, as heretofore commanded by this Court, and for cause why they should not be punished for contempt, they answer and say:

That, as commanded by the peremptory writt of 105
mandamus allowed herein, they levied as provided by
law the tax therein directed to be levied, as will fully
appear by their return to such writ heretofore filed
herein and made part hereof, and by a stipulation
signed and entered into by the parties heretofore
and made part hereof.

They further say that they did not collect and pay
over to the relator herein the taxes so levied be-
cause they have no power, process or authority by
which they can collect or control the disposition of 106
the taxes collected, except so much as may be col-
lected for county purposes.

That under the statutes of Kansas it became
the duty of the County Clerk to make out the tax
rolls each year and to enter therein in proper form
the several tax charges against each tract of land
or item of personal property in the county, and it
becomes the duty of the County Treasurer to col-
lect these taxes and to disburse them as provided
by law, and in the discharge of these duties these 107
officers are supreme; answerable, however, upon
their official bonds for any short-comings or derelic-
tions in the discharge of these powers. And your
respondents say they are not in law, and should
not in fact, be held responsible for the conduct of
other county officers.

That in good faith they did everything that under
the law they could do as commanded by the said
writ of mandamus, and hence pray that they may
be discharged with their costs. 108

THE BOARD OF COUNTY COMMISSIONERS
OF LABETTE COUNTY, KANSAS,
By B. W. PERKINS, their Attorney.

[ENDORSED:]

No. 1992. In U. S. Circuit Court, Dist. of Kan-
sas, ex rel. C. F. Moulton vs. The Board of Com-
missioners of Labette Co., Kansas. Answer to or-
der rule to show cause, &c. Filed June 11, 1880.
A. S. Thomas, Clerk. By J. N. Strickler, Deputy.
B. W. Perkins, for Respondent.

109 And on this day, to wit, June 12, 1880, being at the June Term, 1880, of said Court, in the record of the proceedings thereof, is the following entry, to wit:

SATURDAY, June 12, 1880.

UNITED STATES EX REL. CLARENCE F. MOULTON

vs.

110

THE BOARD OF COUNTY COMMISSIONERS OF LABETTE COUNTY, KANSAS, ET AL.

It is ordered by the Court that this action be and it is hereby continued to the next Term of this Court.

111

IN THE CIRCUIT COURT OF THE UNITED STATES,

DISTRICT OF KANSAS.

UNITED STATES ON THE RELATION OF CLARENCE F. MOULTON

112

vs.

THE BOARD OF COUNTY COMMISSIONERS OF LABETTE COUNTY, KANSAS.

The relator demurs to the "answer" or return to the rule to show cause and says the same is not sufficient in law.

That the said answer does not show any fact or

legal reason why the respondent should not be ad- 113
judged in contempt.

And he prays judgment.

BROWN & CAMPBELL,
Attorneys for Relator.

[ENDORSED:]

No. 1992, U. S. Ex., relation C. F. Moulton vs. the Board of Com. of Labette County. Demurrer. Filed November 24th, 1880. A. S. Thomas, Clerk.

114

CIRCUIT COURT OF THE UNITED STATES,

DISTRICT OF KANSAS—NOVEMBER TERM, 1880.

THE UNITED STATES EX REL. CLARENCE F. MOULUON VS. THE BOARD OF COUNTY COMMISSIONERS OF LABETTE COUNTY, KANSAS.	Mandamus.	115

The relator is plaintiff in a judgment recovered in this Court; in June, 1877, against Oswego Township in the County of Labette, Kansas, for $9,221.34. By a peremptory writ of mandamus, issued August 2d, 1878, the respondents, the Board of County Commis- 116
sioners of Labette County, were commanded to "levy and collect a sufficient tax upon all the taxable property in Oswego Township, in the County of Labette, and State of Kansas, to pay the above mentioned judgment, interest and costs," and "to cause the said moneys to be paid over to the said Clarence F. Moulton upon the said judgment." The return to this writ showed that the respondents had levied a tax sufficient to pay off the relator's judgment, but did not show that the same had been

collected or paid over. Thereupon, upon motion of relator, a rule was issued requiring the respondents to show cause why they should not be committed for contempt in not obeying the writ. In answer to this rule the respondents say: "That as commanded by the peremptory writ of mandamus allowed herein they levied, as provided by law, the tax therein directed to be levied, as will fully appear by their return to such writ, heretofore filed herein and made part hereof, and by a stipulation signed and entered into by the parties hereto and made part hereof, they further say that they did not collect and pay over to the relator herein the taxes so levied, because they have no power, process or authority by which they can collect or control the disposition of the taxes collected, except so much as may be collected for county purposes. That under the statutes of Kansas it becomes the duty of the County Clerk to make out the tax rolls each year and to enter thereon in proper form the several tax charges against each tract of land or item of personal property in the county; and it becomes the duty of the County Treasurer to collect these taxes and to disburse them as provided by law, and in the discharge of these duties those officers are supreme; answerable, however, upon their official bonds, for any shortcomings or derelictions in the discharge of these powers, and your respondents say they are not in the law, and should not in fact, be held responsible for the conduct of other county officers. That in good faith they did everything that under the law they could do, as commanded by the said writ of mandamus, and hence pray that they may be discharged with their costs."

To this return the relator demurs upon the ground that the same is not sufficient in law and does not show any fact of legal reason why the respondents should not be adjudged in contempt.

BROWN & CAMPBELL,
For Relator.

B. W. PERKINS,
For Respondents.

McCRARY, Circuit Judge: 121

1. Assuming that the return is true in fact does it excuse the Board of County Commissioners from the performance of so much of the command of the writ as ordered them to collect and pay over, as well as to levy the taxes to pay relator's judgment? The excuse offered is, in brief, that although commanded to levy, collect and pay over, the respondents are powerless to do more than levy, since the law devolves the duty of collecting and paying over upon 122
another officer of the county, the Treasurer, who can only act upon tax rolls to be prepared by the County Clerk. The office, and the only office, of the writ of mandamus when addressed to a public officer, is to compel him to exercise such functions as the law confers upon him. Where the law enjoins upon such an officer the performance of a specific act or duty, obedience to the law may, in the absence of other adequate remedy be enforced by the writ, but the writ neither creates nor confers power upon the 123
officer to whom it is directed.

It can do no more than to command the exercise of powers already existing.

High on Extraordinary Remedies, Sec. 32.
Johnson vs. Lucus, 11 Humph., 306.
Railroad Co. vs. Randolph, 24 Tex., 317.
Williams vs. Smith, 6 Cal., 91.
People vs. Forqner Breese, 68.
United States vs. County of Clark, 95 U. S., 769.

124

These principles are established, not only by the cases here cited but also by many others; indeed, they are among the elementary and fundamental principles of the law of mandamus. Applying them to this case, we are brought inevitably to the conclusion that so much of the mandate of the writ as commanded the respondents to perform duties, which they had under the law no power to perform, was void. It was not competent for the Court to

125 devolve upon the respondents any official duty whatever; it was only competent to bring into action; to compel the exercise of powers and duties conferred upon the respondents by law.

It is said that this rule will operate oppressively upon the relator by requiring him to institute a separate proceeding in mandamus against each of the officers of the county, charged with the performance of any duty in connection with the levying, collecting and paying over the taxes necessary for
126 the satisfaction of his judgment. The Court cannot presume that the officers of a county, sworn to perform their official duties, will so conduct themselves as to make this necessary, especially in view of the fact that the only possible result of such action would be to accumulate costs, to be paid in the end by their constituents. If, however, the apprehensions of counsel for relator in this regard should all be realized, it would still be our duty to declare and enforce the law as it is, regardless of consequences.
127 The Courts do not make the law, and they cannot charge it to suit the convenience of litigants. The remedy by mandamus is appropriate and adequate; it may be repeated as often as the occasion requires, and although the debtor corporation or its officers may delay the enforcement and final collection of a judgment, by refusing to act except under compulsion, the court rendering the judgment is clothed with ample power to enforce it. If the respondents or the other county officials so act as to make it
128 necessary to multiply writs and add costs to the already heavy burdens of the debtor corporation, I see no way in which this Court can prevent it. In the case of Rees vs. City of Watertown, 19 Wall., 107, the Supreme Court of the United States was asked to sanction a departure from the usual course of proceedings in cases of this character upon the ground that the municipality had disregarded the mandate of a *mandamus*, *alias mandamus* and *pluries mandamus*, commanding it to levy a tax to pay the relator's judgment, and the officers to avoid

obedience had resigned their offices, so that there 129
seemed to be better prospect of enforcing the judgment by the ordinary means. Nevertheless the Court said:

"The remedy is in law, and is thereof adequate and perfect; the difficulty is in its execution only, the want of a remedy, and the inability to obtain the fruits of a remedy, are quite distinct, and yet they are confounded in the present proceeding; the legal remedy is adequate and complete, and time and the law must perfect its execution." 130

2. It is suggested by counsel for the relator, that the Board of County Commissioners are authorized, by the terms of sec. 6, ch. 107, Laws of Kansas of 1876, to levy and collect the taxes necessary to pay this judgment. That section is as follows:

"Whenever any bonds shall be issued in pursuance of the foregoing provisions it shall be the duty of the Board of County Commissioners or the Mayor and Council of the city to levy and collect annually, in addition to other taxes, a tax on all taxable prop- 131
erty in such county, township or city sufficient to pay the interest on such bonds as the same shall become due, and to create a sinking fund sufficient to pay said bonds at maturity; and such tax shall be collected as other taxes are collected, and paid out by the treasurer upon presentation of the coupons or bonds when due at the treasurer's office, or at such place as may be specified in the petition or proposition herein mentioned."

This section prescribes no new mode of collecting 132
or paying over these particular taxes. It must be construed as applying the machinery afforded by pre-existing laws to the collection and disbursement of the taxes provided for in that act. True, it provided in general terms that the Board of County Commissioners shall "levy and collect" the taxes, but it also in the same sentence declares that "such tax shall be collected as other taxes are collected;" this last provision only makes clear what would probably have been the meaning of the section

133 without it, since a general provision directing the Board of Commissioners to collect a particular tax could hardly be held to go further than to require them to proceed according to law to perform that duty, through the proper officers and agencies.

The section further provides that the tax when collected shall be "paid out by the treasurer on presentation of the coupons or bonds, when due, at the treasurer's office," &c., which clearly shows that the Board of County Commissioners were not em-
134 powered to perform that duty. Inasmuch as this section provides for the collection of the tax "as other taxes are collected," &c., it becomes necessary to inquire how other taxes are levied and collected under the statutes of Kansas.

It is conceded that it is the duty of the County Board to make the levy. Who is to collect and pay over? By section 83, chapter 107, Compiled Laws of Kansas, 1879, it is made the duty of the County Clerk to prepare
135 annually, immediately after the first Monday in August, a tax roll, which roll he shall, on or before the first day of November, deliver to the county treasurer, charging him "with the amount of the respective taxes assessed on the tax roll;" subsequent provisions of the same chapter provide for the collection of taxes by the treasurer. I have already cited the provision of the statute which makes it the duty of the treasurer to pay over the particular taxes now under consideration to the parties en-
136 titled thereto. It appears then that the statute requires:

1. That the taxes shall be levied by the Board of County Commissioners.

2. That the tax roll shall be prepared by the county clerk.

3. That the taxes shall be collected and paid over by the treasurer.

4. It is insisted that the performance of all the foregoing duties, by the several officers above named, may be commanded by a single writ ad-

dressed to the Board of County Commissioners 137
alone. It is said that under the law of Kansas each county is a corporation, under the name and style of "the Board of County Commissioners of the County of ," and that, therefore, a writ addressed to the board is addressed to the corporation, and may command the board through its several agents to perform all the duties commanded by the writ.

Each organized county within the State of Kansas is a body corporate and politic, and in all suits by or 138
against a county the name in which the county shall sue or be sued shall be "the Board of County Commissioners of the County of " (Chap. 25 Compiled Laws of Kansas, 1879, secs. 1 and 5). In Commissioners vs. Sellew, 99 U. S., 624, the Supreme Court say: "As the corporation can only act through agents, the Courts will operate upon the agents through the corporations; when a copy of the writ, which has been ordered, is served upon the clerk of the board, it will be served on the corpora- 139
tion and be equivalent to a command that the person who may be member of the board shall do what is required. If the members fail to obey, those guilty of disobedience may, if necessary, be punished for contempt. Although the command is in form to the board, it may be enforced against those through whom alone it can be obeyed. * * * The board is in effect the officer, and the members of the board are but the agents who perform its duties; while the board is proceeded against in its 140
corporate capacity, the individual members are punished in their natural capacities for failure to do what the law requires of them, as the representatives of the corporation."

In that case the question was whether the writ was properly addressed to the board in its corporate capacity, and it was held that such was the proper practice; the writ once served is retained until the thing is done which is commanded, and that it "may at all times be enforced through those who are, for the

time being, charged with the obligation of acting for the corporation." It is not decided that a mandamus addressed to the board may command the performance of duties which the law devolves upon the clerk and the treasurer. No such question was considered. The question in the present case is, can the members of the Board of County Commissioners be punished for contempt in failing to collect and pay over the tax levied by them to pay relator's judgment? It is insisted that it was the duty of all the officers of the county, including the clerk and treasurer, to take notice of and obey the mandate of the writ addressed to the board. If this were granted, it would not follow that the board should be held in contempt, for if the writ can be regarded as addressed to and operating upon the clerk and treasurer, then *those officers* may be in contempt for failing to obey it, while the board, if it has performed its duty fully, may be exonerated. The members of the board cannot be punished for a failure of the clerk or treasurer to discharge his duty. But I should have great difficulty in holding that the clerk or treasurer could be punished for failing to obey a writ not adddressed to or served upon him, and which does not name him or command him in terms to do anything. I am not prepared to say that in such a case as the present the writ might not run against the corporation and be servéd upon the several officers who have duties to perform commanding each to perform the only duty required of him by law, with respect to the levy, collection and paying over the tax. But that has not been done. The case is one in which, by inadvertence, the command of the writ is too broad; it commands the board to perform the functions which belong to other officials. The remedy is to take a new writ against the clerk and treasurer commanding them to discharge their duties. Such writs will be freely granted at any time.

4. Counsel for relator have suggested that the board have not done all that was in their power in

their endeavor to obey the writ. It is said that they 145
might, after levying the tax, institute proceedings in mandamus to compel the other officials of the county to go on and collect and pay over, and that they might sue such officials on their official bonds for damages for their failure to do so. I suppose the board could do either or both of the things suggested, and, if relator insists, an order may issue directing them to institute such proceedings, or to show cause why they have not done so; but I think the counsel will, upon a little reflection, conclude 146
that the relief he would obtain in this way would probably prove to be very inadequate.

No other remedy is likely to be found so effectual as that which is afforded by the writ of mandamus issued by the Court in which the judgment is rendered and addressed to the official or officials whose duty it is to levy, collect and pay over the taxes requisite for the satisfaction of the judgment. The demurrer is overruled.

FOSTER, District Judge, concurring. 147

No. 1992. The United States *ex rel.* Clarence F. Moulton vs. Board of County Commissioners of Labette Co., Kansas. Opinion. Filed Dec. 17, 1880. McCrary, Circuit Judge. A. S. Thomas, Clerk.

148

149 IN THE CIRCUIT COURT OF THE UNITED STATES,

DISTRICT OF KANSAS.

The UNITED STATES OF AMERICA EX RELATIONE CLARENCE F. MOULTON

vs.

150 THE BOARD OF COUNTY COMMISSIONERS OF LABETTE COUNTY, KANSAS, THE CLERK OF SAID BOARD AND THE CLERK OF SAID COUNTY OF LABETTE, AND THE TREASURER OF SAID COUNTY OF LABETTE, STATE OF KANSAS.

Information for Mandamus.

151

TO THE HONORABLE THE JUDGES OF SAID COURT:

Your relator, Clarence F. Moulton, respectfully shows unto your Honors that heretofore, to wit, on the 7th day of June, 1877, by the consideration of this honorable Court, in a certain action, theretofore depending therein, wherein your relator was plaintiff, and the Township of Oswego in said County of Labette, State aforesaid, was defendant, the same
152 being cause No. (1653), your relator recovered a judgment against the defendant therein for $9,221.34 damages and costs, and accruing costs, to wit, $500, which said judgment bears interest at seven per cent. per annum, from the rendition thereof, and is still in full force and effect, and in no wise reversed, vacated, modified or satisfied.

Further, your relator shows that the aforesaid damages and costs so recovered as aforesaid, were for so much money then and there due and owing to your relator from the defendant in said cause

upon certain coupons or interest warrants made for 153
and representing the installments of interest heretofore accruing upon certain bonds issued by the said Board of County Commissioners in behalf of and as trustees of the said Township of Oswego under and in pursuance of the laws of the State of Kansas, and especially of chapter 90 of the Laws of 1870 of said State, and in accordance with a vote of the electors of said township, all of which matters and things will more fully and at large appear by the record and proceedings in said cause now re- 154
maining in this Court, to which reference is made.

Further, your relator shows to the Court, that under the law of the State of Kansas no execution upon judgments at law is authorized or can be issued against such corporations as the said township or said board, but that your relator's sole and only remedy is by the mandamus of this Court to compel the said board and the others, the said defendants, to levy, collect and pay over a tax sufficient to pay his said judgment, interest and costs on the tax- 155
able property of and within the boundaries of the said township of Oswego.

Thereupon the maturity of said coupons, and upon the rendition of said judgment, it became and was the duty of the said defendants, the said board, and of the other the said defendants, as well by the law of the land as by the especial statute under which said bonds were issued and the statutes of Kansas to levy, collect and pay over to your relator a tax upon all the taxable property within said 156
township sufficient to pay said judgment, interest and costs and costs of increase, and that particularly it became and was the duty of said board then and there to levy and collect such tax on such property sufficient to pay such judgment, and especially it so became and was such duty made section 6 of the said chapter 90 of the laws of said State, passed in the year 1870, and to do and perform in the manner and at the time required by law each and every, all and singular, the matters and things in respect

to this special tax that are by law to be done by them in respect to general taxation, and it particularly became and was the duty of said clerk of said board and said county, under the said laws of said State, to enter on record such levy of such tax, and to enter the same on a tax list or roll, and to record the proceedings of said board in respect to such taxation, and all proceedings that by law should be had and recorded in reference to taxation, and to determine, extend and carry out the sum or sums of money to be levied or extended against each and every tract or lot of land, and all other taxable property, as provided by said laws, and to set down such tax in a separate column, and to complete the said roll or list in the manner and at the time required by law, and to attach thereto his certificate and the seals of said county and corporation and deliver the same to the said county treasurer at the time and in the manner required by law; and to do and perform in the proper manner, and at the proper time, each and every act and thing by law required to be done in respect to taxation.

And especially it became and was the duty of said treasurer to accept and receive such tax roll and list from said clerk and to proceed, as provided by law, to collect such tax and to publish the list required by law, and to distrain for said tax, and to advertise lands for sale for the non-payment of the same, and to offer the same for sale and strike them off at such sale, all at the time and in the manner provided by law, and to take each and every, all and singular, the process and proceedings, and do and perform each and every act and duty imposed upon him by law in respect to the enforcement and collection of taxes the same in respect to this tax as to other and general taxes, and at the time and in the manner provided by law, and to pay such tax over to the relator or unto the Court for his use.

Further, your relator shows to the Court that heretofore, to wit, on the 12th day of April, A. D. 1881, he demanded of each and every of the said

defendants the performance of their said several 161
duties, and the said defendants and each of them have hitherto neglected and refused to perform the same, or any of them, and still so neglect and refuse.

Wherefore, and inasmuch as your relator is without any plain, speedy and adequate remedy in the ordinary course of the law, he prays that the writ of mandamus of the United States of America may issue out of this Court in due form of law, commanding the performance of their said several du- 162
ties by the several defendants, and he will ever pray.

CLARENCE F. MOULTON,
Relator.
By S. E. BROWN,
His Attorney.

IN THE CIRCUIT COURT OF THE UNITED STATES,
163
DISTRICT OF KANSAS.

THE UNITED STATES OF AMERICA *Er Relatione* CLARENCE F. MOULTON

vs.

THE BOARD OF COUNTY COMMISSIONERS OF LABETTE COUNTY, KANSAS; THE CLERK OF SAID BOARD AND THE CLERK OF SAID COUNTY OF LABETTE AND THE TREASURER OF SAID COUNTY OF LABETTE, STATE OF KANSAS. 164

Comes now the relator herein, and upon the information and affidavit herein, moves the Court that a writ of mandamus issue as prayed.

S. E. BROWN,
Attorney for Relator.

165 UNITED STATES OF AMERICA,
District of Iowa.

I, S. E. BROWN, being duly sworn, do say that I am the attorney of the relator in this cause. That I know the contents of the foregoing information; that the statements thereof are true, as I verily believe.

S. E. BROWN.

Subscribed and sworn to before me this 10th day
166 of June, 1881.

[SEAL.] A. S. THOMAS,
Clerk.

On hearing the within information, motion and affidavit, ordered that an alternative writ of mandamus issue as prayed in due form, returnable to the next term of this court.

[ENDORSED:]

167 No. 1992. In U. S. Circuit Court, District of Kansas. The U. S. *ex rel.* Clarence F. Moulton vs. Board of County Commissioners of Labette County, Kansas, information. Filed June 10, 1881. A. S. Thomas, Clerk.

168

169

UNITED STATES OF AMERICA, District of Kansas, } ss.:

At a term of the Circuit Court of the United States of America, for the District of Kansas, begun and held at the City of Leavenworth, in said district, on Monday, the 6th day of June, 1881, proceedings were had, and appear of record, in words and 170 figures following, to wit:

FRIDAY, June 10, 1881.

UNITED STATES *ex rel.* CLARENCE F. MOULTON

vs.

BOARD OF COUNTY COMMISSIONERS OF LABETTE COUNTY, KANSAS, AND TRUSTEES OF OSWEGO TOWNSHIP IN SAID COUNTY. } 1992. 171

Now comes the relator herein by Brown & Campbell, his attorneys, and on his motion it is ordered by the Court that an alternative writ of mandamus be, and is hereby allowed, and ordered to issue herein to and against said defendants. 172

173 UNITED STATES OF AMERICA, } ss.:
District of Kansas, }

IN THE CIRCUIT COURT OF THE UNITED STATES,

DISTRICT OF KANSAS.

THE UNITED STATES *ex relatione*, CLARENCE F. MOULTON

174 vs.

THE BOARD OF COUNTY COMMISSIONERS OF LABETTE COUNTY, KANSAS, AND THE CLERK OF SAID BOARD, AND THE CLERK OF SAID COUNTY OF LABETTE, AND THE TREASURER OF SAID COUNTY OF LABETTE, STATE OF KANSAS.

175 THE UNITED STATES OF AMERICA TO THE SAID BOARD AND THE CLERK THEREOF, AND TO THE CLERK OF SAID COUNTY OF LABETTE, AND TO THE TREASURER OF SAID COUNTY OF LABETTE, STATE OF KANSAS, GREETING:

Whereas, it has been shown to our Circuit Court of the United States, for the District of Kansas, that the relator, who is a citizen of the State of New York, did, on the 7th day of June, 1877, by the con-
176 sideration of this Court, after due proceedings had in that behalf, recover a judgment against the township of Oswego, in said County of Labette, for the sum of $9,221.34, with interest at 7 per cent. from the rendition thereof, with costs taxed, $109.69, and with further costs taxed at about $400, the same being for so much money due and then owing to the relator from the said defendant upon divers coupons or interest warrants given for the several instalments of interests before that time accruing upon sundry bonds theretofore, issued or caused to

be issued in the name and behalf of said Oswego 177
Township, in said County of Labette, by the said
Board of County Commissioners of said county,
pursuant to the Act of the Legislature of said State,
entitled An Act to Enable Municipal Townships to
Subscribe for Stock in any Railroad, and to Provide
for the Payment of the Same, approved February
25, 1870, and which said bonds were made payable
to the Missouri, Kansas and Texas Railway Com-
pany or bearer, and the said judgment being now in
full force and effect, and in nowise vacated, modi- 178
fied or reversed, all of which more fully appears
from our records, still remaining in our said Circuit
Court; and whereas, it further appears that it be-
came and was the duty of said board to levy and
collect and pay over to the relator, as well as by the
law of the land as by the statute under which said
bonds were issued, a tax upon all the taxable prop-
erty in the said Township of Oswego as then consti-
tuted, and that it was the duty of said board to do
each and every other, and all and singular, acts and 179
doings to make effectual such tax; and whereas, it
further appears that it was and is the duty of the
said clerk of said county, and the clerk of said board,
to extend said tax, and to enter the levy thereof
of record, and to enter the same on the tax list or
roll, and to record the proceedings of said board in
respect to such taxation, and all proceedings that by
law should be had and recorded in reference to tax-
ation, and to determine, extend and carry out the
sum or sums of money to be levied or extended 180
against each tract or lot of land and other taxable
property, as provided by said laws, and to set down
said tax in separate columns, and to complete the
said tax roll or list in the manner and at the time
required by law, to attach thereto his certificate and
the seal of said county and corporation, and deliver
the same, the said tax list or roll, to the treasurer of
said county at the time and in the manner required
by law, and to do and perform in the proper man-
ner at the proper time each and every act and thing

by law required to be done in respect to taxation; and, whereas, it further appears that it was then and now is the duty of the treasurer of said county to accept and receive such tax roll or list from said clerk, and to proceed as by law provided, to collect such tax, and to publish the list required by law, and to distrain for said tax, and to advertise land for sale for the non-payment of such taxes, and to offer the same for sale, and strike the same off at such sale, all at the time and in the manner provided by law, and to take each and every, all and singular, the process and proceedings, and do and perform each and every act and duty imposed upon him by law in respect to the enforcement and collection of taxes, the same in respect to this tax as to other and general taxes, and in the manner and at the time provided by law, and to pay such taxes over to the relator or into this court for his use.

And whereas, it further appears to us that the due performance of your said several duties in this behalf hath been duly demanded of you and each of you, and that you have hitherto neglected and refused, and do still refuse and neglect, to perform your said several duties.

And it further appears to us that the relator is without any plain, speedy and adequate remedy at law.

Now, therefore, we being willing that full and speedy justice be done, do command that you the said Board of County Commissioners of Labette County, State of Kansas, do forthwith levy and collect and pay over, or cause to be collected and paid over, to the relator a tax on all the taxable property within the Township of Oswego, as constituted in the year 1870. And to do and perform in the manner and at the time required by law each and every and all singular the matters and things in respect to this special tax that are required by law by you to be done in respect to general taxation, and we do further command that you the said clerk of the said board of the said county do enter

on record the levy of such tax and enter the same 185
on a tax roll or list and record the proceedings of said board in respect to such taxation, and all proceedings that by law should be had and recorded in reference to taxation and determine, extend and carry out the sum or sums of money to be levied or extended against each and every tract or lot of land and all other taxable property as provided by said laws, and set down such tax in a separate column and complete the said tax roll or list in the manner and at the time required by law, and attach thereto 186
your certificate and the seal of your office and the seal of your county and corporation, and that you deliver the same so sealed and signed to the treasurer of your said county at the time and in the manner required by law, and that you do and perform in the proper manner and at the proper time each and every act and thing by law required to be done in respect to taxation. And we command you the said treasurer of said county to accept and receive the said tax roll or list from said clerk, and to 187
proceed as provided by law to collect such tax, and to publish the list required by law and to distrain for said tax and to advertise lands for sale for the non-payment of such tax, and to offer the same for sale and to strike them off at such sale. All to be done in the manner and at the time required by law, and to take each and every and all and singular the process and proceedings and do and perform each and every act and thing imposed upon you by the law in respect to the enforcement or collection of 188
taxes, the same in respect to this tax as to other and general taxes, at the time and in the manner provided by law, and that you pay the said moneys to the relator or into this Court for his use, or that you the said board and the said clerk of said board and the said clerk of said county and the said treasurer of said county appear and show cause before our Circuit Court of the United States of America, in and for the District of Kansas, to be begun and holden at Topeka in said District before our said

189 Judges, on the 28th day of November, 1881, why you have not obeyed this writ, and that you make due returns on this writ with your certificate of your acts and doings in the premises.

Witness:

HON. MORRISON R. WAITE, Chief Justice of the Supreme Court of the United States of America, with the seal of said Circuit Court affixed, at Topeka, in said District, this 9th day of July, 1881.

[SEAL.] A. S. THOMAS,

190 Clerk.

The within writ of mandamus allowed by the Circuit Court of the United States, District of Kansas, on the 10th day of June, 1881.

C. G. FOSTER,
Judge.

UNITED STATES OF AMERICA, }
District of Kansas, } ss.:

191 I, B. F. SIMPSON, Marshall of the United States for the District of Kansas, do hereby certify the within and foregoing to be a true, full and perfect copy of the original alternative writ of mandamus now in my possession, with all endorsements thereon.

B. F. SIMPSON,
Marshal, District of Kansas,
By S. P. WADE,
Deputy.

192 [ENDORSED.]

No. 1992, U. S. *ex rel.* Clarence F. Moulton vs. The Board of County Commissioners of the County of Labette, *et al.*, alternative writ of mandamus.

U. S. Marshal's Return—Received this writ this the 10th day of July, 1881, and served the same at the County of Labette, State and District of Kansas, on the 21st day of July, 1881, by delivering personally to George Thornton, Treasurer of said County of Labette, State of Kansas, and to W. H. Kuirsey,

Clerk of said County of Labette and Clerk of said 193
Board of County Commissioners of said County of Labette, and to J. J. Henderson, a member of the Board of County Commissioners of the said County of Labette, and to A. N. Russell, a member of the Board of County Commissioners of the County of Labette, each a true and certified copy of the original alternative writ of mandamus, with all the endorsements thereon. At the same time I exhibited to each of the above-named county officers, to wit: George Thornton, Treasurer, W. H. Kuirsey, 194
Clerk, and J. J. Henderson and A. N. Russell, members of the County Board of Commissioners of said County of Labette, the original alternative writ of mandamus, with the seal of this honorable court affixed thereto, and at same place and time I delivered, personally, to D. J. Doolen, Chairman of the Board of County Commissioners of the said County of Labette, the original alternative writ of mandamus, with all the endorsements thereon, of which this writ is a true and certified copy thereof. 195

B. F. SIMPSON,
U. S. Marshal,
By S. P. WADE,
Deputy.

Fees $46.50.
Paid by Plaintiff.

[ENDORSED.]

Filed July 27, 1881, A. S. Thomas, Clerk, by W. W. Gelatt, Deputy. 196

197

THE UNITED STATES EX REL., CLARENCE F. MOULTON

vs.

THE BOARD OF COUNTY COMMISSIONERS OF LABETTE COUNTY, KANSAS, ET AL.

Demurrer.

In the Circuit Court of the U. S. for the District of Kansas, November Term, 1881.

198 Now comes the respondents by their attorney, B. W. Perkins, and jointly and severally demurrer to the alternative writ of mandamus heretofore issued herein and ask that the same be quashed and set aside for the reasons following, to wit:

1st. Because the Court has no jurisdiction of the persons of the respondents on the subject of the action.

2nd. Because of defect of parties, defendants.

199 3rd. Because severally causes of action are improperly joined.

4th. Because the writ does not state facts sufficient to entitle the relator to the relief demanded against the respondents.

Wherefore the respondents ask to be discharged with their costs.

B. W. PERKINS,
Attorney for Respondents.

200 In the U. S. Circuit Court for the District of Kansas, No. 1992.

The U. S. *ex rel.*, Clarence F. Moulton vs. The Board of County Commissioners of Labette County, Kansas, and others, demurrers to alternative writ of mandamus, filed November 29, 1881.

A. S. THOMAS,
Clerk.

B. W. PERKINS,
Attorney for Respondents.

UNITED STATES OF AMERICA, District of Kansas. } ss.: 201

At a term of the Circuit Court of the United States of America, for the District of Kansas, begun and held at the City of Topeka, in said District, on Monday, the 28th day of November, 1881, proceedings were had, and appear of record, in words and figures following, to wit:

THURSDAY, December 1, 1881. 202

UNITED STATES *ex rel.* CLARENCE F. MOULTON vs. THE BOARD OF COUNTY COMMISSIONERS of Labette County, Kansas.	1992.

203

The defendant's demurrer to the alternative writ of mandamus herein came on to be heard and was argued by counsel, on consideration whereof it is ordered by the Court that said demurrer be, and is hereby overruled, and on motion of said relator it is ordered by the Court that a peremptory writ of mandamus be, and is now here allowed and ordered to issue herein against the defendants and officers thereof, returnable to November Term, 1882. To which ruling, decision and order of the Court the defendant excepts. 204

205 UNITED STATES OF AMERICA, }
District of Kansas. } ss.:

IN THE CIRCUIT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF KANSAS.

THE UNITED STATES OF AMERICA TO THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LABETTE, IN THE STATE OF KANSAS, AND THE CLERK OF SAID BOARD, AND TO THE CLERK OF
206 SAID COUNTY OF LABETTE, AND TO THE TREASURER OF SAID COUNTY OF LABETTE, STATE OF KANSAS, GREETING:

Whereas, it has been shown to our Circuit Court of the United States for the District of Kansas, that Clarence F. Moulton, the relator, who is a citizen of the State of New York, did on the 7th day of June, 1877, by the consideration of this Court, after due proceedings had in that behalf, recovered a judgment against the township of Oswego, in said
207 County of Labette, for the sum of $9,227.34, with interest at 7 % from the rendition thereof, with costs taxed $161.39, and with further costs taxed at about $400, the same being for so much money due and there owing to the relator from the said defendant, upon divers coupons or interest warrants given for the several installments of interest before that time accruing upon sundry bonds theretofore issued, or caused to be issued, in the name and behalf of said Oswego Township, in said County of Labette,
208 by the said Board of County Commissioners of said County, pursuant to the Act of the Legislature of said State, entitled "An Act to Enable Municipal Townships to Subscribe for Stock in any Railroad, and to Provide for the Payment of the Same," approved February 25th, 1870; and which said bonds were made payable to the Missouri, Kansas and Texas Railway Company, or bearer, and the said judgment being now in full force and effect and in nowise vacated, modified or reversed, all of which

more fully appears from our records still remaining 209
in our said Circuit Court; and,

Whereas, it further appears that it became and was the duty of said board to levy and collect and pay over to the relator, as well as by the law of the land as by the statute under which said bonds were issued, a tax upon all the taxable property in the said township of Oswego, as then constituted, and that it was the duty of said board to do each and every other and all and singular acts and doings to make effectual such tax; and whereas, it further ap- 110
pears that it was and is the duty of the said clerk of said county and the clerk of said board to extend said tax and to enter the levy thereof of record, and to enter the same on the tax list or roll and to record the proceedings of said board in respect to such tax ation, and all proceedings that by law should be had and recorded in reference to taxation, and to determine, extend and carry out the sum or sums of money to be levied or extended against each tract or lot of land and other taxable property, as provided 211
by said laws, and to set down said tax in separate columns and to complete the said tax roll or list in the manner and at the time required by law, to attach thereto his certificate and the seal of said county and corporation, and deliver the same, the said tax list or roll, to the treasurer of said county, at the time and in the manner required by law, and to do and perform in the proper manner, at the proper time, each and every act and thing by law required to be done in respect to taxation. 212

And whereas, it further appears that it was then and now is the duty of the treasurer of said county to accept and receive such tax roll or list from said clerk, and to proceed, as by law provided, to collect such tax, and to publish the list required by law, and to distrain for said tax, and to advertise lands for sale, for the non-payment of such taxes, and to offer the same for sale, and to strike the same off at such sale; all at the time and in the manner provided by law, and to take each and every, all and singular, the process and proceedings, and do and

perform each and every act and duty imposed upon him by law, and in respect to the enforcement and collection of taxes, the same in respect to this tax as to other and general taxes, and in the manner and at the time provided by law, and to pay such taxes over to the relator, or into this Court for his use.

And whereas, it further appears to us that the due performance of your said several duties in this behalf hath been duly demanded of you and each of you, and that you have hitherto neglected and refused, and do still neglect and refuse to perform your said several duties, and it further appears to us that the relator is without any plain, speedy and adequate remedy at law.

Now, therefore, we being willing that full and speedy justice be done, do command you, the said Board of County Commissioners of Labette County, State of Kansas, do forthwith levy and collect and pay over, or cause to be collected and paid over to the relator a tax on all the taxable property within the township of Oswego, as constituted in the year 1870, and to do and perform, in the manner and at the time required by law, each and every, all and singular, the matters and things in respect to this special tax that are required by law by you to be done in respect to general taxation.

And we do further command that you, the said clerk of the said board of the said county do enter of record the levy of such tax, and enter the same on a tax roll or list and record the proceedings of said board in respect to such taxation, and all proceedings that by law should be had and recorded in reference to taxation, and determine, extend and carry out the sum or sums of money to be levied or extended against each and every tract or lot of land, and all other taxable property as provided by said laws, and set down such tax in a separate column, and complete the said tax roll or list in the manner and at the time required by law, and attach thereto your certificate and the seal of your office, and the seal of your county and corporation, and that you deliver the same, so sealed and signed, to the treas-

urer of your said county, at the time and in the 217
manner required by law, and that you do and perform, in the proper manner and at the proper time, each and every act and thing by law required to be done in respect to taxation.

And we command you, the said treasurer of said county, to accept and receive the said tax roll or list from said clerk, and to proceed as provided by law to collect such tax and to publish the list required by law, and to distrain for said tax, and to advertise lands for sale for the non-payment of such tax, and 218
to offer the same for sale, and to strike them off at such sale. All to be done in the manner and at the time required by law, and to take each and every and all and singular the process and proceedings, and do and perform each and every act and thing imposed upon you by the law in respect to the enforcement or collection of taxes, the same in respect to this tax as to other and general taxes, at the time and in the manner provided by law, and that you pay the said moneys to the relator, or into this Court for his 219
use.

And that you make due return on this writ to and before the Circuit Court aforesaid to be held in Topeka, in said district, before the Judges of said Court, on the 27th day of November, 1882, with your certificate of your acts and doings in the premises.

Witness, Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, with 220
[seal.] the seal of said Circuit Court affixed at Topeka, in said district, this 6th day of March, 1882.

A. S. Thomas,
Clerk.

The within writ of mandamus allowed by the Circuit Court of the United States, District of Kansas, on the 1st day of December, 1881.

C. G. Foster,
Judge.

221 UNITED STATES OF AMERICA, }
District of Kansas, } ss.:

I, B. F. SIMPSON, Marshal of the United States for the District of Kansas, do hereby certify the within and foregoing to be a true, full and perfect copy of the original peremptory writ of mandamus now in my possession, with all endorsements thereon.

B. F. SIMPSON,
Marshal, District of Kansas,
222 BY S. P. WADE,
Deputy.

[ENDORSED:]

No. 1992. U. S. *ex rel.* Clarence F. Moulton vs. The Board of County Commissioners of Labette County, Kansas, *et al.* Peremptory writ of mandamus. Filed, April 6, 1882. A. S. Thomas, Clerk. By Geo. N. Holmes, Deputy.

223 DISTRICT OF KANSAS, }
U. S. Marshal's Return. } ss.:

Received the original peremptory writ of mandamus in the cause of action, of which this writ is a true and perfect copy thereof, this the 6th day of March, 1882, and served the same as follows, to wit: At the County of Labette, State and District of Kansas, on the 3rd day of April, A. D. 1882, by delivering personally to George Thornton, F. W. Felt, W. G. Hoover and A. N. Russell,
224 each a true and certified copy of the said original peremptory writ of mandamus with all the emdorsements thereon. He, the said George Thornton being then and there the Treasurer; and he, the said F. W. Felt, being then and there the Clerk of the said County of Labette, in the State of Kansas, and he, the said F. W. Felt, being then and there the Clerk of the Board of County Commissioners of the said County of Labette, and they, the said W. G. Hoover and A. N. Russell, being then and there member of the said Board of County Commissioners, of the said County of

Labette, in the State of Kansas, and at the time of 225
said service I executed to each of said persons the said original peremptory writ of mandamus with the seal of this Honorable Court thereon, and afterward, to wit: On the 4th day of April, 1882, at the said County of Labette, in the State of Kansas, I delivered personally to J. J. Henderson the said original peremptory writ of mandamus in this cause of action, he, the said J. J. Henderson being then and there the Chairman of the Board of County Commissioners, in the said County of Labette, State of 226
Kansas.

B. F. SIMPSON,
U. S. Marshal.
By S. P. WADE,
Deputy.

Fees and expenses $47.65, paid by S. E. Brown, Attorney.

THE PRESIDENT OF THE UNITED STATES TO THE HONORABLE THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS—GREETING: 227

UNITED STATES OF AMERICA, ss.:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said Circuit Court before you, between the United States of America, on the relation of Clarence F. Moulton and the Board of County Commissioners of Labette County, Kansas, and the Clerk of said Board and the Clerk of said County of Labette and the Treasurer of said County of Labette, State of Kansas, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears. 228

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that

229 then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held. That the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the
230 laws and custom of the United States should be done.

Witness, the Honorable MORRISON R. WAITE, Chief Justice of the Supreme Court of the United States
[SEAL.] of America, this 10th day of April, A. D. 1882.

A. S. THOMAS,
Clerk of the Circuit Court of the United States for the District of Kansas.

231 (Copy.)

B. W. PERKINS.

Allowed:

C. G. FOSTER,
Judge.

[ENDORSED:]

No. 1992. United States *ex rel.* Clarence F. Moulton vs. Board of County Commissioners of Labette Co. Writ of error. Filed April 10, 1882. A. S.
232 Thomas, Clerk, by Geo. N. Holmes, Deputy.

THE UNITED STATES OF AMERICA TO CLARENCE F. MOULTON, GREETING:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United

States in and for the District of Kansas, in the 8th 233
Circuit, wherein the Board of County Commissioners of Labette County, Kansas, and the clerk of such board, and the Clerk and Treasurer of said Labette County, State of Kansas, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be done to the parties in that behalf.

Given under my hand at the City of 234
Topeka, in the District of Kansas, in the 8th Circuit, the 10th day of April, 1882.

C. G. FOSTER,
U. S. District Judge.

[ENDORSED:]

Service admitted. Brown & Campbell, attys. for relator, June 8th, 1882.

235

[ENDORSED:]

No. 1992. U. S. *ex rel.* Clarence F. Moulton vs. the Board of County Commissioners of Labette County *et al.* Copy of citation. Filed June 8th, 1882. A. G. Thomas, Clerk. By George N. Holmes, Deputy.

Know all men by these presents, that we, the 236
Board of County Commissioners of Labette County, Kansas, and the Clerk of such Board and the Clerk and Treasurer of Labette County, Kansas, as principals, and C. M. Condon and C. O. Perkins as sureties, are held and firmly bound unto Clarence F. Moulton in the full and just sum of five hundred dollars, to be paid to the said Clarence F. Moulton, his certain attorney, executor, administrator or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators or assigns jointly and severally by

237 these presents. Sealed with our seals and dated this 10th day of April, 1882.

Whereas, lately at a term of the Circuit Court of the United States of America for the 8th Circuit and District of Kansas, in a suit depending in said court between the United States of America on the relation of Clarence F. Moulton against the Board of County Commissioners of Labette County, State of Kansas, and the Clerk of such Board and the Clerk and Treasurer of said Labette County, Kan-
238 sas, judgment was rendered against the said defendants. And the said defendants having obtained a writ of error and filed a copy thereof in the Clerk's office of the said court to reverse the judgment rendered in said suit, and a citation directed to the said Clarence F. Moulton, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next.

Now the condition of the above obligation is such
239 that if the said Board of County Commissioners of Labette County, Kansas, and the Clerk of such Board, and the Clerk and Treasurer of said County of Labette, Kansas, defendants, shall prosecute their writ of error to effect and answer all damages and costs if they shall fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

In witness whereof we have hereunto set our hands the day and year above written.

240 The Board of County Commissioners of Labette County, Kansas, and the Clerk of such Board and the Clerk and Treasurer of Labette County, State of Kansas, by their attorney,

B. W. PERKINS.
C. M. CONDON.
C. O. PERKINS.

Approved:
C. G. FOSTER,
Judge.

No. 1992. U. S. *ex rel.* Clarence F. Moulton vs. Board of County Commissioners of Labette County. Bond on error. Filed April 10th, 1882. A. S. Thomas, Clerk. By Geo. N. Holmes, Deputy. 241

UNITED STATES OF AMERICA, } ss.:
District of Kansas, }

242

I, A. S. THOMAS, Clerk of the Circuit Court of the United States of America for the District of Kansas, do hereby certify the foregoing to be a true, full and correct copy from the record of all the proceedings in the action of The United States of America on the relation of Clarence F. Moulton vs. The Board of County Commissioners of Labette County, State of Kansas, and Trustees of Oswego Township in said County of Labette, No. 1992 in said Court, previous to and including the issuing and filing of the writ of error, citation and bond. 243

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office, in Topeka, in said District of Kansas, this 27th day of July, A. D. 1883.

[SEAL.] A. S. THOMAS,
Clerk.

244

245

IN THE SUPREME COURT

OF THE UNITED STATES.

THE UNITED STATES OF AMERICA *ex relatione* CLARENCE F. MOULTON,

246 Defendant in Error.

vs.

THE BOARD OF COUNTY COMMISSIONERS OF LABETTE COUNTY, KANSAS, THE CLERK OF SAID BOARD AND OF SAID COUNTY AND THE TREASURER OF SAID COUNTY OF LABETTE CO., KANSAS.

247

The defendant in error suggests a diminution of the record in this cause and upon the annexed affidavit and stipulation, and the record as filed by the plaintiff in error, and the record in addition thereto duly certified by the Clerk of the Circuit Court, herewith presented and made as defendant in error demands that it should be made, moves the Court that the record be made more full and complete, and
248 that the residue of the record be certified to this Court and that the writ of *certiorari* issue for that purpose, and that such other order be made as may be just and proper.

S. E. BROWN,
Attorney for Relator.

IN THE SUPREME COURT 249

OF THE UNITED STATES.

THE UNITED STATES OF AMERICA, *ex relatione* CLARENCE F. MOULTON,

Defendant in Error,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF LABETTE COUNTY, KANSAS, *et al.* 250

STATE OF NEW YORK, }
City and County of New York, } ss.:

S. E. BROWN, being duly sworn, says that he was the attorney of the defendant in error, the relator, in the Court below and is the counsel for the defend- 251
ant in error in this Court. That the record attached sets forth truly and fully the facts in the case, and the proceedings had therein from the rendition of the judgment at law on the coupons to the filing of the further information set forth in the record presented by the plaintiff in error, except this that the further fact was admitted on argument in the Court below that the Hon. B. W. Perkins was the Judge of the District Court in and for Labette County, Kansas, and appointed a judge *pro tempore*, who 252
granted a perpetual injunction restraining the clerk of the defendant board from extending the tax levied by said board under the peremptory writ of August 2d, 1878.

That in December, 1882, affiant being about to move for process of contempt at the November term, 1882, at Topeka, it was stipulated as appears in the stipulation on file, a copy of which is attached.

That affiant had requested a copy of the record to be sent him as soon as printed, but that he first re-

253 ceived the same July 6th, 1883. And thereupon it was agreed by counsel by letter that this application could still be made if permitted to stand till the last of November, which more fully appears from the letter of Hon. B. W. Perkins, a copy of which is appended, the terms of which were accepted by affiant's letter of July 21st, 1883, a copy of which is appended.

S. E. BROWN.

Sworn and subscribed
254 before me this 22d
day of August, 1883.

W. WALLACE KIRBY,
Notary Public,
Queens Co.

Cert. filed in New York Co.

IN THE SUPREME COURT

255 OF THE UNITED STATES.

THE UNITED STATES OF AMERICA, *ex relatione* CLARENCE F. MOULTON,
Defendant in Error,

vs.

256 THE BOARD OF COUNTY COMMISSIONERS OF LABETTE COUNTY, KANSAS, THE CLERK OF SAID BOARD AND OF SAID COUNTY, AND THE TREASURER OF SAID COUNTY OF LABETTE, KANSAS,
Plaintiffs in Error.

It is stipulated by and between counsel for the parties to this suit that the record shall be printed in this case within ninety days, and that counsel for

defendant in error shall have sixty days thereafter 257
to present and submit a motion suggesting a diminution of the record, and that the case shall be submitted under the rule No. 20, during the first ninety days of the next ensuing term. Counsel for plaintiff in error to serve copy of his argument on counsel for defendant in error during first thirty days of said term; counsel for defendant in error to have thirty days to answer and serve copy of his argument on counsel for plaintiff in errror, and counsel for plaintiff in error to have fifteen days to reply if 258
sa advised. This stipulation to be filed in the office of the Clerk of Supreme Court forthwith

J. D. CAMPBELL,
S. E. BROWN,
Attorneys for Defendant in Error.

H. G. WEBB,
B. W. PERKINS,
Attorneys for Plaintiff in Error.

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OSWEGO, Kansas, July 18th, 1883.

S. E. BROWN, ESQ.,
New York:

MY DEAR SIR—Yours of recent date came to hand and contents noted. If you will wait until I reach Washington, the last of November, I will consent to the filing and hearing of your motion for a diminution of the record in the case of Moulton vs. La- 260
bette County *et al.*, at such time as may suit your convenience. I start for California to-night, to be gone until the first of September, and it will be an accommodation to me not to have the motion heard until I reach Washington, and if you wait until such time I will take no advantage of the stipulation. The delay will make no material difference with you.

Truly yours,
B. W. PERKINS.

July 21st, 1883.

HON. B. W. PERKINS,
Oswego, Kan.:

MY DEAR SIR—Yours of the 18th at hand, and I accept your proposition. I suppose it is enough, but if you prefer you might send me such stipulation, though I hardly think it necessary. Of course I should not take up the motion in your absence and I suppose motion better stand till December—say first Monday. Of course our mutual stipulations as to filing arguments are to be extended likewise, at least I don't hold you to filing argument first thirty days &c., nor do you hold me to time.

It is of course best to have the case heard after the question as to diminution is heard, so we will know what we are talking about and what we are talking upon. Hope you will have a good time. Come and see me, 115 Broadway.

Yours truly,

S. E. BROWN.

112-217

Supreme Court of the United States,

October Term, 1884.

THE BOARD OF COUNTY COMMISSIONERS OF LABETTE COUNTY, KANSAS; THE CLERK OF SAID BOARD, AND THE CLERK OF SAID COUNTY OF LABETTE, AND THE TREASURER OF SAID COUNTY OF LABETTE, STATE OF KANSAS,
PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA EX REL. CLARENCE F. MOULTON,
DEFENDANT IN ERROR.

No. 948.

In Error to the Circuit Court of the United States for the District of Kansas.

STATEMENT OF CASE.

This is a proceeding to enforce the collection of a judgment recovered against the municipal township of Oswego, Labette County, Kansas, by an alternative writ of mandamus against the County Commissioners of the said county of Labette, the Clerk of said Board, and the Clerk and Treasurer of said county of Labette, State of Kansas, and comes to this Court upon writ of error of the Circuit Court of the United States for the District of Kansas.

In our judgment there is much in this record that is of no importance and cannot in any way aid this Court in disposing of the questions that are brought here for review, and that will be pressed upon the attention of the Court, but was incorporated into the record upon the *pro forma* motion of the defendant in error, asking for a diminution of the record, and in this brief we shall confine ourselves to the consideration of that portion of the record which we think important and necessary for the Court's proper understanding of the case.

On the tenth day of June, 1881, (page 38, printed record,) the relator filed his amended information praying for an alternative writ of mandamus against the County Commissioners of Labette County, Kansas, the Clerk of said Board, and the Clerk and Treasurer of said county, compelling them to levy, extend, and collect a tax to pay the judgment recovered against the township of Oswego by the relator on the seventh day of June, 1877, as was cited in said information. On the same day the alternative writ was granted, (see page 43 of record,) and issued on July 9th, 1881, and served July 21st, 1881. (See pages 44, 45, 46, 47, 48, and 49 of record.)

On the twenty-ninth day of November, 1881, at the first term of the Circuit Court for the District of Kansas, after the issuance of the said writ, the respondents below filed a joint and several demurrer to the said alternative writ, and asked that the same be quashed and set aside for the reasons suggested in the said demurrer, which were as follows:

First. Because the Court had no jurisdiction of the persons of the respondents or the subject of the action.

Second. Because of defect of parties defendants.

Third. Because several causes of action were improperly joined.

Fourth. Because the writ did not state facts sufficient to

entitle the relator to the relief demanded against the defendants, (page 50 of the record;) and on the first day of December, 1881, the said demurrer was argued to the Court and considered and overruled and a peremptory writ allowed and ordered to issue against the defendants, returnable to the November term of Court for the year 1882, to which ruling, decision, and order of the Court the respondents at the time excepted, and to review such ruling, decision, and order of the Court the plaintiffs in error prosecute this writ.

Four questions were argued and decided in the Court below, and are here submitted for final decision:

1st. Whether the Court had jurisdiction of the persons of the respondents and the subject of the action.

2d. Whether there was defect of parties defendant.

3d. Whether there were several causes of action improperly joined.

4th. Whether the writ did state facts sufficient to entitle the relator to the relief demanded against all the respondents, and against each of them.

ARGUMENT.

I. *Jurisdiction.*

On the seventh day of June, 1877, Clarence F. Moulton in the Circuit Court of the United States for the District of Kansas recovered a judgment against Oswego township, in the county of Labette, and State of Kansas, for over nine thousand dollars. The action was instituted to recover upon interest coupons of certain bonds issued by said township in aid of the Missouri, Kansas, and Texas Railroad Company. This judgment was not paid by the township of Oswego, and upon the twelfth day of April, 1881, the relator demanded of the plaintiffs in error the levy, extension, and

collection of a tax upon the property of and within the boundaries of said township of Oswego to satisfy such judgment. (See information for mandamus, pages 38, 39, and 40 of record.)

Could this duty be required of these officers? The judgment, as shown in the said record, was recovered against the township of Oswego, and not against the county of Labette or any of its officers, no county officer being a party thereto.

Under the laws of Kansas a township is a complete, independent corporation in and of itself. Section 5965 of the Compiled Laws of 1879, found on page 977, says:

"(5965.) Section 1. Each organized township in this State shall be a body corporate and politic, and, in its proper name, sue and be sued, and may appoint all necessary agents and attorneys in that behalf, and may make all contracts that may be necessary and convenient for the exercise of its corporate powers."

The control of the corporation is mainly lodged in the Township Trustee. The law defining his duties is article 4 of the "Act relating to townships and township officers," took effect March 11, 1868, and is found on pp. 980 and 981, Compiled Laws of 1879, as follows:

"(5988.) Section 22. The duties of the Township Trustee shall be: *First*, to divide his township into convenient road districts, and make such alterations in the same as may be necessary. *Second*, to fill all vacancies in the office of road overseer in his township. *Third*, to see to a proper application of all moneys belonging to his township for road or other purposes. *Fourth*, to have the care and management of all property, real and personal, belonging to his township, and to superintend the various interests thereof. *Fifth*, to cause a record to be made accurately defining the boundaries and number of each road district, as well as all alterations

made in such district or districts in his township, and the number of road overseers in each (such) township. *Sixth*, shall have power to administer all oaths in the necessary discharge of the duties of his office. *Seventh*, shall, by virtue of his office, be judge of elections and overseer of the poor. *Eighth*, shall superintend all the pecuniary concerns of his township, and shall, at the July session of the Board of County Commissioners, annually, with the advice and concurrence of said Board, levy a tax on the property of the citizens of said township for township, road, and other purposes, and report the same to the County Clerk, who shall enter the same on the proper tax roll, in a separate column or columns; and the Treasurer shall collect the same as other taxes are collected; but, in a failure of such Trustee and Commissioners to concur, then the Board of County Commissioners shall levy such township, road, and other taxes. *Ninth*, he shall discharge such other duties as may be imposed by law.

"(5989.) Sec. 23. The Trustee shall examine and audit all accounts and demands against his township, and shall draw orders on the Township Treasurer for all such accounts and demands allowed by him; but no allowance shall be made on any account which does not state specifically each item of the same, and which is not verified by affidavit; and no such allowance shall be made for any amount in excess of that authorized by law for any purpose. No order shall be of any validity until countersigned by the Township Clerk.

"(5990.) Sec. 24. The Township Trustee shall annually, on the second Thursday in January, settle with and audit the accounts of the Township Treasurer, and all Road Overseers in his township, for all moneys disbursed by them; and he shall, within ten days thereafter, cause the Township Clerk to record at length such accounts on the township record.

"(5991.) Sec. 4 (of the law of 1879.) The Township Trustee, Clerk, and Treasurer of each municipal township shall meet on the last Saturday in January, April, July, and October of each year as an Auditing Board, and no bill against any township shall be paid until allowed by a majority of said Auditing Board; and all bills allowed by said Board shall

be recorded by the Clerk in a book to be kept by him for that purpose. The township officers mentioned in this section shall receive for their services in attending to the township business the sum of two dollars per day for the time actually and necessarily spent by them: *Provided*, That this section shall not be construed to include the services of the Trustee for assessing his township, who shall receive therefor the same compensation heretofore allowed.

"(5992.) Sec. 25. The Trustee shall, at the regular meeting of the Board of County Commissioners, next succeeding his annual settlement with the Township Treasurer and Road Overseers, as provided in the next preceding section, make a complete report of the affairs of the township for the preceding year, stating in detail the items of account audited and allowed, the nature of each account, and the name of each person to whom such account was allowed, and such report shall be verified by affidavit; which report and accounts shall thereupon be examined by such Board, and if found correct and in conformity to law, shall be, by said Board, approved and filed in the office of the County Clerk of said county; but if such report and accounts are found not correct, or not in conformity to law, said Board shall cite said Trustee to appear before it, and correct any errors appearing therein. And such Trustee and his bondsmen shall be liable to his township for the amount of any and all accounts and demands by him allowed or paid in excess of that authorized by law for any purpose. And it shall be the duty of the County Attorney of such county to prosecute any and all suits in the name of such township for the recovery of the same, in any court of competent jurisdiction. And the Trustee shall, within ten days after the approval thereof by the Board, furnish a copy of such report, with the approval of said Board thereon, to the Township Clerk for record and publication.

"(5993.) Sec. 1 (laws of 1871.) In addition to the duties now prescribed by law, the township Trustee shall have the custody and disposition of the property of his township, and shall, on going out of office, take, from his successor in office, a receipt for such property as he shall transfer to him, and shall file such receipt with the County Clerk of

his county. And such receipt, when so filed, shall be *prima facie* evidence of the facts therein stated.

"(5994.) Sec. 2. The Township Trustee shall prosecute, in the name of his township, all violations of the different road laws, or any provisions thereof. And, in such prosecution, it shall be the duty of the County Attorney to act on behalf of the township.

"(5995.) Sec. 3. The Township Trustee may remove obstructions from the highways in cases where the road overseers shall refuse or fail to do so. And the Trustee shall, in such cases, have all the power of Road Overseers in calling out the inhabitants to perform the work necessary to remove such obstructions."

This law is set out in full in order to show how completely the township is dissevered from the county organization, and how almost absolute its own control is over its own business, property, and affairs, and how utterly unlike it is to those other township organizations which are simply subdivisions of the county of which they form a part.

It will undoubtedly be admitted by all that if the judgment recovered by the relator, Moulton, was not paid in consequence of some dereliction of duty of the township officers, they could be proceeded against by a mandamus and compelled to do that which the law enjoined upon them as a duty—to levy and have collected a tax with which they could satisfy the said judgment; but can another tribunal, or the officers of another jurisdiction, be compelled to do this in an original action instituted against them to compel the performance of such act?

As before suggested, the plaintiffs in error (the officers of Labette County, Kansas) were not in any way connected with the suit of Moulton against Oswego Township, in which he recovered his said judgment, or in any manner parties thereto. And in the suit at bar the township of Oswego, or

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its officers, are not made defendants or in any way connected therewith. (See Record, pages 38, 39, 40, 41, 42, 44, 45, 46, 47, 48, and 49.) Hence, this action against the Commissioners, Clerk, and Treasurer of Labette County, Kansas, is an original one, instituted against them to compel them by mandamus to perform the duties that should have been performed by the officers of the judgment debtor, the said township of Oswego. Can such power be asserted and jurisdiction exercised by the Circuit Court of the United States? We think it well settled that the Circuit Courts of the United States have no original jurisdiction in actions of mandamus, such power never having been conferred upon them by Congress. These Courts are strictly limited in the use of this extraordinary remedy to cases where it is necessary in aid of a jurisdiction already acquired. (See Bath County *vs.* Amy, 13 Wal., 244; McIntire *vs.* Wood, 7 Cranch, 504; Graham *vs.* Norton, 15 Wal., 427; Marbury *vs.* Madison, 1 Cranch, 49, and High on Extraordinary Remedies, page 29.)

Then, how can the jurisdiction be sustained in the case at bar, where the Circuit Court for the District of Kansas, in a new and original action, commenced against the officers of Labette County, Kansas, the plaintiffs in error, attempted to compel the said officers to perform the duties recited in the writ to satisfy a judgment recovered against the municipal township of Oswego, and to which judgment the said county officers were not parties, or in any way connected?

But to break the force of this inquiry, it will be argued for the defendant in error that the law under which the bonds were issued, and upon which the said defendant in error recovered his judgment against Oswego township, authorize the County Commissioners of the county to levy the necessary tax to satisfy the interest upon the bonds as it should mature from year to year. This we admit to be true;

but how does it change the question of jurisdiction, or confer upon the Circuit Court of the United States the power to proceed against them in an original suit by mandamus to compel them to levy such tax?

Where has such jurisdiction been upheld or exercised? We do not find in the great list of cases decided by this Court in the past a single instance where this jurisdiction or power was exercised under circumstances like those at bar, unless it should be in the case of the Board of County Commissioners of Cherokee County, Kansas, *vs.* William C. Wilson, decided at the last October term, and in such case the question of jurisdiction was not raised or argued by counsel, or considered by the Court. In the great army of cases considered by this Court, and in which the power to compel by mandamus county officers to levy, extend, or collect taxes to satisfy judgments recovered, has been upheld, the judgments were recovered against the county, and the power was exercised in aid of a jurisdiction already acquired.

Under such circumstances, the law is too well settled to admit of doubt, and mandamus is the proper remedy to compel the county officers to perform the duties already enjoined upon them in the law to levy the necessary tax to satisfy the judgments recovered against their county. But does that argue anything for the case at bar?

If, however, it should be argued that this jurisdiction can be exercised in consequence of the peculiar provisions of the statute under which the said bonds were issued, we answer that such statute was repealed by the act of March 7th, 1872, (Session Laws of Kansas, 1872, p. 110, chap. 68,) and which repeal occurred long before the instituting of the suit at bar or the instituting of the suit against the said township of Oswego, in which the said judgment was recovered.

Under the act of 1872 the Auditor of the State is re-

quired to certify the amount necessary to be levied to satisfy the interest upon accruing coupons or bonds to the County Clerk, and thereupon it became the duty of the County Clerk to levy such tax, and the power was taken from the County Commissioners to levy the tax to pay the interest due upon said coupons or bonds. (See Session Laws of Kansas, 1872, p. 110, chap. 68.) Subsequently the act of 1872 was amended so as to make it the duty of the township officers to levy, at the time other taxes are levied, a tax sufficient to pay the interest upon coupons and bonds as it accrues from time to time. (See Session Laws of Kansas, 1874, p. 41, chap. 39.) And thus the law stood at the time of the instituting of the suit against the township of Oswego by the defendant in error, and also at the time of instituting the suit for mandamus, against the plaintiffs in error, of which we complain to this Court. But it will be argued in answer to this fact that the provision of the law of 1870, under which the said bonds were voted, requiring the County Commissioners to levy the tax, became a part of the contract, and that its subsequent repeal in 1872 by the legislature of the State was unconstitutional, and for such reason should be stricken down. Can such argument be upheld? Can it be argued in sincerity that the act of 1872 is unconstitutional because it designates a different officer than that designated by the act of 1870 to levy this tax? Is it not always competent for a State to change its system of levying or collecting its taxes, or the officers or tribunals through which its taxes shall be levied or collected? And can it be said, because such changes are made, that the laws authorizing them are unconstitutional or void because they impair the validity of contracts.

It might be argued with some propriety that if the law should be repealed which provides for the levying of the taxes, and no other provision should be made for the pay-

ment of the debts of the municipality or State, that the act making such repeal would be unconstitutional. But where a State imposes the duty of levying the necessary taxes upon one officer that had theretofore been imposed upon another, does it exceed its constitutional right or authority so to do?

The simple stating of the proposition is its strongest refutation, and needs no elucidation or the citing of authorities to prove its sophistry.

II.—*Parties.*

Is there a defect in the parties defendants? Much of the foregoing argument is applicable to this second question, as well as to the question of jurisdiction, and from such argument it must be apparent that the officers of Oswego township should have been a party to this mandamus suit.

The municipality of Oswego was interested in such litigation. It was Oswego township that had issued the bonds and contracted the debt. It was Oswego township that had been adjudged to pay the debt, and it was the officers of Oswego township that knew whether such judgment had been satisfied or not; and if not satisfied, why, and what defences existed to such judgment, if any. And, as shown, it was the duty of the officers of such township to levy the necessary taxes to satisfy said judgment, if at the time of the instituting of the suit at bar such judgment was a valid, subsisting demand against such township.

Yet, notwithstanding all this, we find the officers of said township ignored, and an original action commenced against the officers of the county to compel them to perform an act, which act should be performed by the township officers, if by any one.

Why was this? Upon what principle can these county officers be brought into court in an original action by manda-

mus to answer for the neglect or shortcomings of the township officers?

Upon what theory can the township officers be ignored and county officers brought into Court to answer for the omissions of the township officers, when such county officers have no interest in the township, are not residents or taxpayers therein, are not the township representatives, and are not in any way responsible to the township for the manner in which they perform their duties, or respond to the obligations imposed upon them in the law?

Counties and townships in Kansas are two distinct and independent classes of municipal corporations. The township cannot act for the county, nor can the county act for the township in any matter whatever, unless specially authorized by law to do so. Each organization has its respective officers, whose duties and powers are defined by law. It cannot be said, therefore, that the county may act for the township because the township is a part of the county. As well might it be said that it could act for a school district and employ its teachers, &c.

From this we argue that it necessarily follows that the officers of the said township of Oswego should have been respondents herein, and because of the failure of the defendant in error to make them such, there is a defect of parties defendants.

III.—*Causes of Action.*

Were there several causes of action improperly joined? This assignment of error will be argued in connection with the next assignment, in which it is claimed the information and writ did not state facts sufficient to entitle the defendant in error to the relief demanded against the plaintiffs in error, the respondents to the said writ.

IV. Did such writ state facts sufficient to entitle the relator (the defendant in error) to the relief demanded against the respondents, and against each and all of them?

Without stopping to trace the history of the writ of mandamus, it seems to be well settled in this country that it is not a prerogative writ, but is to be regarded much in the nature of an ordinary action between the parties, and as a writ of right only to the extent to which the party aggrieved clearly shows himself entitled to this particular species of relief. (See Gilman *vs.* Bassett, 33 Conn., 298; Arbery *vs.* Beaver, 6 Tex., 457; Kendall, *vs.* United States, 12 Pet., 527; and Commonwealth *vs.* Dennison, 24 Howard, 66.)

In Commonwealth *vs.* Dennison, (24 How., 66,) Taney, Chief Justice, referring to the prerogative features of the writ, says: "It is equally well settled that a mandamus in modern practice is nothing more than an action in law between the parties, and is not now regarded as a prerogative writ."

Neither is it a writ of absolute right in all cases, but is largely dependent upon the exercise of a wise judicial discretion, and is directed to some corporation officer or inferior court requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom the writ is directed or from operation of law. (See Dunklin County *vs.* District County Court, 23 Mo., 449.)

That it is very greatly discretionary with the Court, and not matter of legal right in all cases, is too well settled to require the citation of authorities. In one important feature the writ of mandamus is distinguished from many other remedial writs. It is used merely to compel action and coerce the performance of a pre-existing duty. It is to substitute action for inactivity—to set in motion and secure

the performance of a duty *commanded* in the law. But in no case does it have the effect of creating any new authority, or of conferring power which did not previously exist. It is, therefore, in no sense a creative remedy, but its proper function is to compel action by the proper party in a case where there is a clearly-defined existing duty to act without its agency. (See People *vs.* Gilman, 5 Gilm., 242; People *vs.* Hatch, 33 Ill., 140, and High on Extraordinary Legal Remedies, section 7, p. 10, and authorities there cited.)

To warrant the relief by mandamus, the right whose enforcement is sought must be a complete and not merely an inchoate right. And the writ, being justly regarded as one of the highest known to our system of jurisprudence, only issues where there is a clear and specific legal right to be enforced, and where there is no other specific and adequate legal remedy.

It *never issues* in doubtful cases. (See High on Extraordinary Legal Remedies, sec. 9, p. 11; State *vs.* Supervisors of Washington, 2 Chand., 250; Free Press Association *vs.* Nichols, 45 Vt., 7; People *vs.* Solomon, 46 Ill., 419, and People *vs.* Mayor of Chicago, 51 Ill., 28.)

In the case of The State *vs.* Supervisors of Washington (2 Chand., 250) the Court says: "Where the legal right is doubtful, or where the performance of the duty rests in discretion, a writ of mandamus cannot rightfully issue." We believe these rules are so elementary and so universally recognized by the courts of this country that counsel for the defendant in error will look in vain for a precedent to sustain him in opposition to them.

Justice Strong, late of this Court, in the case of the U. S. *vs.* County of Clark, (5 Otto, page 773,) uses this language: "It need not be said that no court will by mandamus compel county officers of the State to do what they are not authorized to do by the laws of the State. A man-

damus does not confer power upon those to whom it is directed. It only enforces the exercise of a power already existing *when it is exercised as a duty.*"

A mandamus should never be awarded except the relator has a clear legal right to have the thing sought by it done, and in the manner and *by the person or body sought* to be coerced, and it must be effectual as a remedy if enforced, and it must be in the power of the party and his duty to do the act sought to be done. The writ confers no new power upon him, and the duty must be a public one, and must be imperative and not discretionary. (See The People *ex rel. vs.* The Chicago and Alton R.R. Co., 55 Ill., 96; also Williams, petitioner, *vs.* County Com'rs, 35 Me., 345.)

As the writ of mandamus will not be allowed unless the act or duty sought to be enforced is *legally* possible at the time and by the officers sought to be coerced, it is a sufficient return to a writ to show that the respondent has not the power to do the act required, and where such act is required the writ should be set aside or quashed. (See State *vs.* Perrine, 5 Vroom, 254, and cases there cited.) In such case the Court says:

"A writ of mandamus will not in general be allowed unless the act commanded to be done is legally possible when the writ issues; consequently a return showing that the person against whom it issued has not the power to do the act is good."

"It has been repeatedly declared by this Court that the proper office of a mandamus is to enforce the performance of an official duty, and that it will not lie to compel an officer to do an act which, without its command, it would not have been lawful for him to do." (See Johnson *vs.* Luers and Goither, The Sup. Court of Tenn., 11 Humple, 307.)

And it is well settled in the English practice, as well as

in the American Courts, that if the writ issues in the first instance for the performance of duties which, in the law the respondents are not at the time bound to do, the writ cannot be supported, and will be quashed or set aside even as to those things which they are compellable to perform. (See 1st Redfield on the Law of Railways, paragraph 157, and authorities cited.)

"And if the alternative writ commands more than is necessary to be done to comply with the statute, it will be quashed, notwithstanding the party might have been entitled to this remedy to a certain extent." (See authorities above cited.

It is also well settled that where the rights or acts to be performed are distinct and wholly independent, one writ will not be awarded but several, and therefore the application should be several. (See note 6, paragraph 151, 1st Redfield on the Law of Railways.) And from the foregoing propositions it logically and necessarily follows that the writ must be good as to all demanded, and as against all respondents, or it is bad in whole and as to all, and this seems to be the well settled law of this country. (See 40 Ill., p. 126; 20 Wis., p. 85; 41 Conn., p. 453; 51 Miss., 406, and authorities cited.)

In the case of the State *ex rel.* Carpenter *vs.* Supervisors of Beloit, (20 Wis., p. 88,) the Court says: "In each of the above cases a rule was granted requiring the Board of Supervisors of the Town of Beloit and the Common Council of the City of Beloit to appear and show cause why a peremptory writ of mandamus should not be granted commanding them to proceed and levy a tax to pay the judgment described in the applications. It is now moved on behalf of the respondents that this rule be vacated and discharged for various reasons. We are satisfied that the motion must pre-

vail so far as the city of Beloit is concerned, because we deem it an irregular practice to ask for several writs of mandamus in a single rule. * * *

"It is very apparent that the duty to be performed by the Board of Supervisors and the City Council is several in its nature. * * *

"The practice of moving for one or more writs of mandamus in the same rule we deem improper—to this extent, at least, that only one writ should issue on such a rule.

"But because too much is asked for in the rule, or because the rule is in the alternative, that a writ be granted against the town and against the city, or that several peremptory writs be granted, it is argued that the whole rule should be discharged, for it is said the relator must show a clear, legal right to all he asks for; and if he demand too much, judgment will be for the respondents.

"Such seems to be the practice when an alternative writ is issued in the first instance; then if the alternative writ asks for too much the peremptory writ will not be awarded, for the Courts say the peremptory writ must follow the alternative mandamus, and there cannot be judgment for the relator for part and for the respondent for the other part."

Again, it is the well-settled law of mandamus that the writ will not issue until the officer against whom it is asked is in default, and he is never in default until he has been in condition to perform the act desired and until he has refused to perform such act upon demand of the party who has the right to have the act performed. (See Moses on Mandamus, pages 18 and 98; 3d Stevens' Nisi-Prius, 22–92, and High on Extraordinary Legal Remedies, part 1, sec. 12, top page 24.)

In the light of these propositions and authorities let us look briefly at the facts and law of the case at bar. We find the officers of Oswego township, the judgment debtor,

not made parties to this proceeding. We find the officers of Labette county, Kansas, who were not parties to the original suit brought into Court in an original action instituted against them by mandamus to compel them to perform certain acts, which, it is alleged, they in right should perform. It is asked that the Commissioners of the county shall be compelled to levy a tax upon the property of the township to satisfy the judgment recovered in the original action against the township, and it is asked that the Clerk of the county shall enter and extend this tax which has not been levied, upon the tax-rolls of the county, and deliver such rolls, with his certificate and the seal of said county attached thereto, to the Treasurer of said county. And it is asked that the Treasurer of the county shall be compelled to accept and receive such tax-roll or list from the said Clerk and proceed to collect such tax, and to publish the list and to distrain for said tax, and to advertise land for sale for the non-payment of such tax and to offer the same for sale, and to strike the same off at such sale, and to pay such taxes over to the relator. (See writ, pages 44, 45, and 46 of record. All this is asked when it is admitted that such tax has not been levied by the Commissioners of the county or by the officers of Oswego township, and when no tax-rolls have been prepared containing or charging such tax, and when no such tax could be collected, and when no list containing such tax could be published, and when no distraints for such tax could be made, and when no lands could be advertised for sale for the non-payment of such taxes, or offered for sale, or struck off at such sale, and when no taxes could be paid over to the relator or into Court for his use. Under the laws of Kansas the duties of these several officers are separate and distinct. Those of the Commissioners are independent of the Clerk or Treasurer, and those of the Clerk are independent of the Commission-

ers or Treasurer, and those of the Treasurer are independent and distinct from those of the Commissioners and Clerk, except as the tax must be lawfully levied and entered and extended upon the tax-rolls before he, the Treasurer, can take any step or do any act towards the collecting of the same.

The Commissioners cannot act for the Clerk or for the Treasurer, nor can the Clerk act for the Commissioners or for the Treasurer, and so with the Treasurer, he being entirely unable in the law to perform the duties of these other officers. Each officer has his duties and powers defined and clearly fixed in the law, and yet in this proceeding we find one information filed against them, and one writ issued, in which all are joined and in which all are commanded to perform these separate and distinct duties.

The duties and powers of the County Commissioners are prescribed and defined in section 83, ch. 107, Compiled Statutes of Kansas, 1879, which section is as follows:

"Sec. 83. The County Commissioners shall meet on the first Monday in August, in each year, and shall estimate and determine the amount of money to be raised by tax for all county purposes, and all other taxes which they shall be required to levy."

The duties and powers of the County Clerk are prescribed and defined by section 84 of the same ch., and the section is as follows:

"(5857.) Sec. 84. The County Clerk, immediately after the first Monday in August, shall proceed to determine the sums, in dollars and cents, rejecting fractions of a cent, to be levied upon each tract or lot of real property, in the name of the owner, if known, and upon the amount of personal property in the name of each person, company, or corporation, * * * * He shall complete the same and attach his certificate thereto, and deliver it to the County

Treasurer on or before the first day of November, and shall charge the Treasurer with *the amount of* the respective *taxes assessed on the tax-roll*."

And the duties and powers of the County Treasurer are prescribed and defined by sec. 88, of the same chapter, and subsequent sections down to and inclusive of sec. 137 of such chapter.

Sec. 88 reads as follows: "*As soon as the County Treasurer shall have received the tax-roll of his county*, he shall cause a notice to be published in a newspaper published in his county, or if there be none, then in a paper having a general circulation therein, for two consecutive weeks, stating in said notice the amount of taxes *charged* for State, county, township, school, city, or other purposes on each one hundred dollars' valuation."

Under these sections, or under any statute of the State of Kansas, has the County Clerk power or authority to enter and extend on the tax-rolls any charge against the property of the township until the tax, to satisfy which the said charge is made, has been levied by the proper officers or officer, and in the manner prescribed by law?

And until such tax is levied is the County Clerk in default because he does not enter and extend the same upon the tax-rolls? And so with the County Treasurer. Under what provisions of statute or common law can he be commanded to collect and pay over a tax that has never been levied, or entered and extended on the tax-rolls? By what authority of law can he be compelled "to advertise land for sale for the non-payment" of taxes that have never been levied, and to offer land "for sale and strike the same off at such sale" to satisfy taxes that never had an existence?

Now, let us recall one of the propositions of law heretofore suggested, and what becomes of this case?

An officer cannot be proceeded against by mandamus until he is in default and has refused and neglected to perform a duty, the performance of which is enjoined upon him by law.

High on Extraordinary Legal Remedies, part I, sec. 12, top page 24, says:

"*Mandamus is never granted in anticipation of a supposed omission of duty, however strong the presumption may be that the person whom it is sought to coerce by the writ will refuse to perform his duty when the proper time arrives.* It is therefore incumbent on the relator to show an *actual omission* on the part of the respondent, to perform the required act, and since *there can be no such omission before the time has arrived for the performance of the duty, the writ will not issue before that time.* In other words, the relator must show that the respondent is *actually in default* in the performance of a legal duty, *then due at his hands;* and *no threats or pre-determination can take the place of such default before the time arrives* when the duty should be performed, *nor does the law contemplate such a degree of diligence as the performance of a duty not yet due.*"

With this proposition of law in mind let us return to the facts of the case at bar, and ask could the County Clerk of Labette County, Kansas, have been in default at the time the writ was issued against him, because he had not entered upon the tax-rolls a tax that was never levied, and can the County Treasurer of said county be adjudged a wrong-doer at such time because he had not collected a tax that never had an existence, and was never entered or extended upon the tax-rolls of his county?

These propositions are axiomatic, and from the simple statement of them it becomes so apparent that this action cannot be sustained as to the County Clerk and County Treasurer that we will not presume upon the court's time or patience for their further elaboration or consideration.

With the action erroneously or improvidently brought as to the Clerk and Treasurer, the action must fail as to all, on the well-settled principles of law heretofore suggested, and the judgment of the Circuit Court must be reversed, with instructions to sustain the demurrer and to quash the writ as to all the respondents.

But we insist that under the statutes and laws of Kansas the respondents, the County Commissioners, could not levy the taxes demanded by the relator in his information for the writ of mandamus.

We know the recent case of the Commissioners of Cherokee county, Kansas, *vs.* Wilson will be cited as settling this question, but we ask a review and reconsideration of the question, because of its importance and the vast interests involved, and we call the attention of the Court to the several statutes of Kansas and to the decisions of the Supreme Court of the State, as they were correctly cited in the brief of counsel for plaintiffs in error, in such case of the Commissioners *vs.* Wilson, as conclusive upon this subject. From the foregoing we think it necessarily follows that several causes of action were improperly joined in the said suit by mandamus—

First. Against the Commissioners of Labette county to compel them to levy a tax to satisfy the judgment of the relator against the township of Oswego;

Second. Against the County Clerk of the county to compel him to extend and enter upon the tax-rolls the tax that at such time had not been ascertained or levied; and,

Third. To compel the Treasurer of the county to collect and pay over a tax that at such time had not been levied, entered, or extended upon the tax-rolls of his county, and that never had an existence.

From the foregoing we think it necessarily follows that the action of the Circuit Court was wrong in overruling the

demurrer of the plaintiffs in error, and in granting a peremptory writ of mandamus against them. And, to recapitulate, we think the Court erred, first, because it did not have jurisdiction of the subject of the action, it being an original suit instituted against the officers of Labette county, Kansas, to enforce the collection of a judgment obtained against Oswego township and not against the county of Labette, and to which the said plaintiffs in error were not parties or in any way connected.

Second. Because the officers of Oswego township are necessary parties to the said suit, and are the parties who should levy the tax to satisfy the said judgment if the same is a valid and subsisting demand against Oswego township.

Third. Because the Commissioners are not the proper parties, and have not the power under the statutes of Kansas to levy the necessary tax to satisfy the said judgment.

Fourth. Because several causes of action were improperly joined; first, to compel the County Commissioners to levy the tax to satisfy the said judgment; second, to compel the County Clerk to extend the tax not yet levied upon the tax-rolls; and third, to compel the County Treasurer to collect a tax not yet levied or extended upon the tax-rolls.

Fifth. Because the suit against the County Clerk could not be sustained until he was in default, and he could not have been in default until the tax to satisfy the said judgment had been levied by the proper officers, and until he had refused to extend the same upon the tax-rolls.

Sixth. Because the suit against the County Treasurer could not be sustained until after he was in default, and he could not have been in default until after the said tax had been levied by the proper officers, and until after the Clerk had extended the same upon the tax-rolls, and until after he (the County Treasurer) had refused and neglected to collect the same.

Seventh. Because if the said writ of mandamus was bad in part or in any particular it was bad in whole, and should have been quashed and set aside as to each and all of the plaintiffs in error, the respondents to said writ.

We know it will be argued that the recent case of the County Commissioners of Cherokee County, Kansas, against William C. Wilson is conclusive, and settles the questions involved in this suit, but we do not so understand it.

In that case the Court clearly says that the Clerk and Treasurer of the county took no exceptions to the judgment of the Court below, and were not complaining of the action of the Court against them. And this Court announced the proposition familiar to all lawyers, that the County Commissioners would not be permitted to complain of errors committed against parties not then before the Court, and in that case the question of jurisdiction was not argued or brought to the Court's consideration, or settled by the decree pronounced, except so far as it may have been settled for the purposes of that single suit, and we now urge upon the attention of the Court the questions we have argued for its consideration, confidently believing that they will receive that careful investigation their importance demands, and confidently believing that the plaintiffs in error will not be concluded from a full consideration of the questions of this case by the judgment rendered in the said suit of the County Commissioners of the said County of Cherokee against Wilson.

We are aware there is a popular impression abroad in the land that many of the Federal courts are organized to sustain every action instituted by a bondholder against a municipal corporation, and we know it is said that the only argument necessary to sustain such action is the following syllogistic one: "This is a bond suit; the defendant is a municipal corporation; the bonds have not been paid; therefore judgment must be for the plaintiff."

We confess that this impression is so general that we are somewhat embarrassed by it, and yet we come to the Court of last resort, the highest Court of this great nation, hoping and confidently believing that the plaintiffs in error, although the representatives of a county in Kansas, will have their rights and interests guarded and protected by that zealous and distinguished care that characterizes this high tribunal in other cases; hoping and confidently believing that precedents will not be ignored and swept away, decisions of courts learned in the law overlooked or unheeded, and judicial legislation indulged in to sustain a proceeding no precedent or authority for which can be found in the books.

The equities of the municipal township of Oswego are not properly before this Court for consideration; but, if here, a story of wrong against the township could be presented which would satisfy every impartial ear that the relator in this case should not be sustained in his extraordinary efforts to secure a remedy against an insolvent debtor that is without authority in the statutes and without precedent in the courts; and, confidently believing that he is asking such against the plaintiffs in error, they submit this case, knowing that the decision will be right and sustained by a learning and irresistible logic that will carry conviction to all.

B. W. PERKINS,
Attorney for the Plaintiffs in Error.

112-277

Supreme Court of the United States.

October Term, 1884. No. 948.

The Board of County Commissioners of Labette County, et. al., Plaintiffs in Error,
vs.
The United States, ex. rel. Clarence F. Moulton, Defendant in Error.

Error to the Circuit Court of the United States for the District of Kansas.

Brief of Plaintiff in Error, in reply to Brief of Defendant in Error.

B. W. PERKINS, Attorney
for Plaintiff in Error.

S. E. BROWN, Attorney
for Defendant in Error.

DEMOCRAT PRINT, OSWEGO, KANSAS.

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The United States, ex. rel. Clarence F. Moulton, Defendant in Error.

Brief of B. W. Perkins, Attorney for Plaintiff in Error, in reply to Brief of S. E. Brown, Attorney for Defendant in Error.

Replying to the brief of defendant in error, by his attorney, S. E. Brown, I desire most respectfully to submit:

1. That all of that portion of the argument contained in said brief of defendant in error, devoted to the matters and things contained in the first 37 pages of the printed record herein, is a discussion of questions not material to the controversy before this honorable court in this proceeding, as all of the pro-

ceedings had as contained in pages 1 to 37 inclusive, of said record, were finally and conclusively settled by the adjudication of the Circuit Court in holding and deciding that the answer of the Board to the complaint of the defendant in error was sufficient, and upon the rendering of said decision of the court, upon the demurrer of the relator—now defendant in error herein—(see pages 31 to 37 inclusive, P. R.), having been overruled, the relator abandoned those proceedings and instituted this action, making new parties defendants, and in all respects and for all purposes treated the former proceedings as at an end. The "information for mandamus," filed June 10th, 1881, does not purport to be an amended information, or in any manner refer to or relate to the former proceedings had by the relator, but is an original and entirely independent proceeding, adding new parties defendant and of itself complete, and in no wise relating to or connected with the former proceedings of the relator contained in the record from page 1 to 37 inclusive.

It is true that the *writ* of mandamus is simply the execution of the Court, but when the writ has issued and been served, and the officers upon whom it was served make a sufficient and lawful return thereof, by showing that they had complied with its mandate, and their showing in this particular is held sufficient by the Court from whence the writ issued, it would seem that so far as that proceeding is concerned it is at an end, and the relator (defendant in error) having elected to abandon his former proceed-

ings, and proceed anew by original information, can not now be heard to say that "the bringing in of the Board to this writ and the amended or further information on which it was based, was a work of supererogation." (Page 9, Brief Defendant in error.) The relator (defendant in error) treated and acted upon the proceedings began June 10th, 1881, as original in their nature, and no where until in the brief of counsel for defendant in error has it been claimed otherwise. I therefore insist that so much of the record as pertains to the mandamus proceedings had prior to the filing of the relator's "Information for Mandamus," June 10th, 1881, page 38, P. R. is immaterial, and not properly before this Court for consideration.

II. I do not think there can be much "confusion of ideas" as suggested by counsel for defendant in error, in my argument that this is an original action of mandamus, when the record clearly bears me out in the position—but upon this feature of the case I have already said all that it seems to me necessary, as I think it most clearly manifest from this record that the questions presented here for consideration are properly raised, and will receive the attention and consideration of the Court. As to the nature of the writ of mandamus, and the rules governing the practice and procedure in this kind of an action, for I contend, in the language of Chief Justice Taney, in Commonwealth *vs.* Dennison, (24 Howard, 66) that "Mandamus in modern practice is nothing more

than an action in law between the parties, and is not now regarded as a prerogative writ," I shall only refer your honors again to the cases cited on page 13 of my former brief filed herein.

Counsel for defendant in error on page 10 of his brief, in referring to my position that the respondents are strangers to the debtor corporation, says: "Counsel, however, stopped short and omitted any mention of the laws of 1874 and 1876." Counsel is in error. On page 10 of my brief I call the attention of the Court specifically to the amendment of the law of 1872, by the act of 1874, (see page 10, former brief, pl'ff in error) and I urged that such was the law at the time of the instituting of the suit against the Township, and also at the time of the commencement of the proceedings of which we now complain.

III. Counsel for defendant in error, after quoting Sec. 6 of the Act of February 25th, 1870, says: "Here the County Board is required to levy the township tax to pay the debt provided for, without the trustee being required to act in any way, which is accounted for by the fact, as we are informed, and as the record tends to show, that it had become the practice, under the provisions of the general revenue law, which we have cited," &c. (Page 11, Brief of defendant in error.)

Just where the record in this case "tends to show" any such practice, counsel does not advise us, and we are at a loss to understand what light this

statement of counsel sheds upon the proper interpretation of the law under discussion, as I presume no "practice" of the County Board would change or alter the law providing the manner in which these taxes are to be levied and collected.

But does Sec. 6 of the law of February 25th, 1870 bear the construction contended for by counsel for defendant in error?

Said Sec. 6 provides as follows: "Whenever any bonds shall be issued in pursuance of the foregoing provisions, it shall be the duty of the Board of County Commissioners annually to *proceed* to *levy* and *collect* a tax on all the taxable property in such township; * * * * *and such tax* shall be collected as county and township taxes are collected * * * *." Now, how is the Board to *proceed* to levy and collect these taxes? Is any departure from the general law under which taxes are levied and collected provided in this section? It seems to me there can be but one answer. That the Board is to proceed in the manner provided by law, and through and by the proper officers this tax shall be levied and collected as township taxes are levied and collected, as provided by the general law of the State in relation to the levy and collection of taxes.

IV. The act of 1872, having been repealed by the act of March 9th, 1874, its consideration can be of but little importance in this case, and I pass directly to the act of March 9th, 1874, (Session Laws,

1874, page 41) quoted by counsel for defendant in error at page 14 of his brief.

As suggested in my former brief, this act of 1874 furnishes the law in relation to the levy and collection of these taxes, at the time of the commencement of the Mandamus proceedings complained of here, and also at the time of the rendition of the judgment against the debtor township, June 7th, 1877. The act of March 9th, 1874, provides as follows: "Sec. 7. It shall be the duty of the *proper officers* of any *county*, *city* or *township*, in which bonds have been voted for any of the purposes in the act to which this act is amendatory, annually at the time when other taxes are levied, to levy and cause to be collected a sufficient tax * * * * ." Now, who are the "proper officers?" Counsel for defendant in error says the object of the framer of this section was not to create a new system for the levy and collection of taxes. Just what was in the mind of the legislator who framed section 7 of the bill, I presume will never be ascertained, if the plain English in it does not convey the meaning intended. The language is simple, plain and unambiguous. "It shall be the duty of the proper officers"—proper officers of what?—"of any *county*, *city* or *township*."

Who are the "proper officers" of the township? By reference to those sections of our Statute quoted on pages 4, 5, 6 and 7 of my former brief, it will be readily seen that the independent and complete cor-

poration known under our law as a municipal township is represented and controlled by a Trustee, Clerk and Treasurer, the Trustee being more particularly entrusted with the management of the pecuniary concerns of the township, and with the "advice and concurrence" of the Board of County Commissioners, levies the necessary taxes, (*Sec 22, pp.* 980 *and* 981, *Compiled Laws*, 1879) and is one of the "proper officers" referred to in said section 7 upon whom is placed the duty to "levy and cause to be collected" the taxes referred to in said section. That the officers of the respective county, city, and township organizations were contemplated and in view in this act of 1874, it seems to me is further evidenced by the particularity with which they are referred to and named in the other sections of the act. Sec. 1 of the act under discussion provides: "That section 1 of chapter 68 of the session laws of 1872 * * * be amended as follows: Section 1. The Board of county commissioners of any *county*, the mayor and common council of any incoporated *city*, and the *trustee*, *clerk* and *treasurer* of any *municipal township* in this state. * * * *."*

"Sec. 2. When a petition * * * * shall be presented to the board of county commissioners of such county, the mayor and common council of such city, or the *trustee*, *clerk* and *treasurer* of such municipal township * * * * *."*

"Sec. 8. The board of county commissioners

any county, the *trustee*, *clerk* and *treasurer* of such municipal township in this state * * * * ."

I have quoted the foregoing portions of sections one, two and eight of the act, for the purpose of showing that the Legislature throughout the entire act recognized the independent existence of the county, city and township organizations, and when it used the language, "it shall be the duty of the proper officers," in section 7, it meant just what it said, that those officers through whom these corporations act were to perform the duties prescribed in the act. But counsel for defendant in error insists that section 13 of the act removes all doubt upon the question, and quotes an extract from that section to sustain his view. I presume that the whole section will be construed together, and that its meaning is not to be ascertained by the consideration of garbled extracts. The section referred to provides: "It will be the duty of the board of county commissioners of any county in which railroad bonds shall be issued under the provisions of this act, annually, at the time when other taxes are levied, to levy and cause to be collected *as other taxes are levied and collected*, (the italics are mine) a sufficient tax to pay the interest on all bonds issued for railroad purposes by such *county* or any township therein as the same falls due, and for the purpose of creating a sinking fund for the final redemption of such bonds. * * * ." It will be readily observed that this section does not attempt to confer any new power or duty on the

board of county commissioners, but is in simple harmony with the other provisions of the act, providing only that these taxes shall be levied and collected as "other taxes are levied and collected," viz: by the "proper officers of any county, city or township."

From the foregoing citations from the different statutes of this State, it seems to me that the position taken in my former brief, that under the laws of this State a township is a complete, independent corporation in and of itself, and that the remedy of the township creditor is against the township and its "proper officers," and not against the board of county commissioners, county clerk and county treasurer without in any manner bringing the township into Court.

I have thus discussed the different laws of the State of Kansas relative to the subject matter in controversy, endeavoring as best I can to follow counsel for defendant in error in his extended discussion of these acts. But, after all, admitting for the purpose of the argument, all that counsel claims in reference to the meaning of the various statutes quoted, how does it change the question of jurisdiction? or how does it answer the question, Is there a defect in the parties defendant? Does it follow that if counsel for defendant in error's position is correct, that the board of county commissioners should levy and collect this tax, that the county clerk and treasurer are to be held in defaulf for the non-performance of duties they have had no opportunity to perform? Can

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they be said to be subject to Mandamus proceedings to compel them to perform functions they have no power or authority of law to exercise? Can the treasurer and county clerk be said to be in default and subject to this writ, when it was not within their power to perform its command? The bare statement of the proposition, it seems to me, refutes such an idea, and no argument is necessary. Then, such being the case, it seems to me the writ does not state facts sufficient to entitle the relator to the relief demanded against the repondents, and against each and all of them. While the treasurer and county clerk have certain powers conferred upon them, and duties to perform in relation to the levy and collection of taxes after certain other proceedings have been had, yet they cannot act, and I think cannot be said to be in default for not acting until the preliminary steps have been taken, which authorize them to perform, and place them in a position *to* perform the duties imposed upon them by law.

Counsel for defendant in error next quotes the concluding clause of section 9, session laws of 1876. (Page 18, Brief defendant in error.) I am unable to discover any thing in this act at variance with the positions I have taken in relation to the case at bar, and fail to discover anything that tends to give aid to counsel in his theory. Under the clause of the section quoted by counsel, the board of county commissioners are required to "levy and collect, *as all other taxes are levied and collected*," &c. Now,

I think it evident, without argument, that it was not intended, and that this section does not confer any new power or duties upon the board of county commissioners, but that they are simply required in conjunction with the "proper officers" of the township to mak the levy, and until a refusal at least upon the part of the proper officers of the township, the board have no power to act. But in order to avert this difficulty counsel for defendant in error (page 19 of brief) says that "at all events, under the general law, they (meaning the board) must levy the tax in the precise case made by the plaintiffs in error themselves, namely, the case of refusal to co-operate on the part of the trustee." No such case is made upon the part of the plaintiffs in error. The only questions, as I take it, before this Court, are those raised upon the demurrer of the respondents to the relator's writ. There is nothing in the writ, or the information upon which it is based, showing any default or failure upon the part of the trustee. He is in no wise referred to or by the remotest inference connected with this proceeding, and I should regard it as idling away my time and trifling with the Court to go outside of, and discuss matters and questions not raised by or connected with the controversy before the Court.

Counsel for defendant in error (page 20 of his brief) puts the question, "*Who are* the officers to whom the execution of this Court is to be directed, to enforce the satisfaction of this judgment?" and

then answers it himself by saying, "We say to those upon whom, by the law of the contract and the law since, the duty is laid not merely to levy, but collect and pay over a tax sufficient to pay the same." I think I might adopt this answer with perfect safety, and pass the question, for I presume it will not be contended that any of the officers upon whom any of the duties suggested by counsel rest, could be proceeded against until they have been placed in default, or have failed to perform some duty or act, which they could lawfully perform, and then the question again arises, how can the treasurer and county clerk be in default or held subject to this writ for the failure to perform acts which they had not the power or opportunity to perform.

Counsel having answered the question himself perhaps to his own satisfaction, may not desire any further answer, but if it will aid him in any way, I might suggest that the writ *might* be addressed to the corporation and served upon the several officers who have duties to perform. *See opinion Judge McCreary, P. R. 36.*

It might aid somewhat in the discussion of this case for counsel for defendant in error to be a little more particular in his citations of the "History of Kansas," giving volume and page, if the charges and alleged severe criticisms made by him upon the conduct of the municipal affairs of the township of Oswego, are to enter into the consideration of this case. And it is unjust to the Court below to inti-

mate that the questions of law involved in this demurrer, were decided by it, or the mind of the Court influenced by its "Judicial" or any other kind of "notice" of the delinquencies of this (in the mind of counsel) wicked township.

We have no fear of this case being determined upon any other than the rules of law governing it, and shall not stop to reply to counsel's arraignment of the township, further than to say that it is difficult to see why the board of county commissioners, county treasurer and clerk should be held to suffer on account of the dereliction of duty upon the part of the debtor township, if any such dereliction exists.

V. Counsel for defendant in error attempts to meet our objection, that the treasurer and clerk are not in default, and therefore not subject to the writ, by alleging that he has shown by the amended record what is "tantamount" to a refusal and neglect of the *clerk*, but makes no contention that any refusal has been shown upon the part of the treasurer to perform every duty required of him, except as it is admitted, as he says, by the demurrer, which I will notice hereafter.

Counsel not having designated page or portion of the record showing any failure or refusal upon the part of the clerk, and as we can only guess at what is referred to, we will assume that counsel refers to that part of the record, in which it appears that the county clerk was enjoined from extending the tax

levied by said board under the peremptory writ of August 2nd, 1878. How the clerk can be said to be in default and subject to this writ because he obeyed the restraining order of a Court of competent jurisdiction, is beyond our comprehension, and I leave this portion of counsel's "argument" without further remark.

Now, as to the admissions upon demurrer. Counsel for defendant in error insists that we are concluded by the rule that a demurrer admits the truth of the allegations of the pleading. I of course do not dispute the familiar rule applicable upon the issues of law raised by demurrer. But I suppose it will also be admitted that the pleading must be construed as a whole, and that it must be construed in the light of the law applicable to it, and also, that if in its different parts one or more allegations are inconsistent with another, or others, that its allegations will be construed most strictly against the pleader. Now, it may be conceded that the writ (or as counsel for defendant in error designates it, the "declaration") does generally allege the non-performance of the duties which it says are required of the treasurer and clerk, but this same "declaration" clearly shows by its allegations of the non-performance of those acts by those officers which must under the law precede the action of the clerk and treasurer, that it was not in the power of the clerk and treasurer to perform the acts commanded by the writ, as at no time is it alleged or pretended, that they were in a posi-

tion to do that of which it is complained they failed to do. If the writ or declaration alleged the action of the officers, who must first act before the treasurer or clerk can act, and then a refusal upon their part, under such circumstances, they might be said to be in default, and the declaration show such default, and the writ maintained, but in the absence of such showing or allegation, and in the presence of a clear showing in the declaration that the preliminary steps have not been taken by the proper officers, necessary to be taken before the clerk and treasurer can act, it would seem that the declaration fails to make such a statement of facts, that when admitted on demurrer, are sufficient to place the clerk and treasurer in default. The mere allegation of such default, when wholly inconsistent with the facts set forth in the declaration and the law applicable thereto, we think cannot be sufficient to control. The allegation of the pleader that the clerk and treasurer have failed to perform their respective duties, is a mere conclusion not warranted by but wholly inconsistent with the *facts* plead.

"If a plea is bad in law a demurrer to it admits no fact alleged in it." *Duncan vs. Thwaites*, 3 *B. & C.*, 584.

"A demurrer does not confess matter of *law* deduced, by either party, from facts pleaded by him. For such matter is not a proper subject of admission in the pleadings; it being exclusively the province of the Court to apply the facts alleged." *Gould Pl*

ch. IX, § 29, Millard vs. Baldwin 3 Gray, 484.

Whether the Clerk and Treasurer are subject to this writ, is a question of law, to be determined from all the facts stated, and any mere conclusions of law of the pleader cannot in any manner aid or strengthen the declaration.

The writ declares that it was the duty of the board to collect and pay over to the relator a tax upon all the taxable property in the township of Oswego, that "it was the duty of the clerk of said county and clerk of said board to extend said tax," &c. (Page 45, P. R.) It is, therefore, apparent from the "declaration" that something remained to be done by the board before the clerk or treasurer could act, and this defect we think is not cured by the allegation that they and each of them had neglected and refused to perform their respective duties.

What I have already said in my former brief, and herein, with reference to the distinct and seperate corporations known under the law of the State of Kansas as "counties," and "municipal townships," will apply also to the remarks of counsel, (page 21, brief defendant in error) suggesting the relation of the board of county commissioners *pro hac vice* to the township organization.

VI. The counsel for defendant in error next quotes certain sections of the tax law of the State, and a number of decisions of the Supreme Court, which do not seem to meet with his approval, and

then indulges in another attack upon what he is pleased to denominate "a hostile and repudiating township," and ventures his opinion that the "inhabitants would not pay a tax for this judgment unless obliged so to do under stress of losing their property under tax sale." We shall not attempt to meet this branch of counsel's "argument" until it shall have become apparent that the "inhabitants" are likely to be injured by his reflections.

There is nothing further in the brief of counsel for defendant in error, up to his quotation from the opinion of Chief Justice Waite in the case against Cherokee County, bearing upon the questions arising in this case that have not been as I think hereinbefore, or in my former brief considered. I am still of the opinion that the decision of the Cherokee county case is not conclusive upon us in this case, as I think an examination of the record, and opinion filed will show that the same questions raised herein, were not determined, and that so far as the clerk and treasurer are concerned, they were not parties to the writ of error, and made no complaint of the ruling of the Circuit Court.

VII. I did not expect in this case to be called upon to defend any official act of my own, and still would pass counsel for defendant in error's remarks by withont reply, were it not for the fact that a misstatement is made by him in relation to my connection with the case. On page 27 of his brief he uses

the following language: "Is it too much to say that he (meaning the county clerk) was meekly subservient to the learned Judge of his Court, then and now counsel for plaintiffs in error," and on page 28 the following: "What a comedy was enacted when the learned counsel for plaintiffs in error descended from the judicial seat and put off the ermine and allowed a member of the bar to be elected by the attorneys present, a Judge *pro tempore* to enjoin this clerk from extending this tax." "Surely" "justice standeth afar off and judgment is turned backward."

The first statement quoted above is not in accordance with the fact, as the record shows, and as is admitted by the second statement quoted.

I do not know what the practice of the counsel for defendant in error would be if like opportunity were to present itself, but during the ten years I tried to fill the position of Judge of this District, I never had it charged against me that I sat as Judge in a case where I was interested either as counsel or otherwise, and when occasion of that nature arose, there was but one course to pursue, as in the case complained of by counsel, to retire from the bench and let a Judge *pro tempore* be elected in the manner prescribed by law in such cases. *Secs. 4 and 5 Compiled Laws 1879, page 320.*

Counsel for defendant in error in his affidavit in support of his motion for a diminution of the record, (page 249, P. R.) states that "it was admitted on

argument in the Court below that the Hon. B. W. Perkins was the Judge of the District Cou.t in and for Labette county, and appointed a Judge *pro tempore*," &c. This statement as will appear from the corrected printed record herein was erroneous, as the fact is now admitted to be, that it was admitted in argument, and that the *fact* was, that the Judge *pro tem* was elected by the bar.

I have called the Court's attention to this matter simply that no mistake should be made as to my connection with and action in the matter, and not because I deemed it of any importance in the consideration of this case, or that I felt the need of any defence of myself before this Court for any act of mine, private or public.

I close this brief, fully persuaded that this case will receive that attention and learned consideration for which this honorable court is noted.

Most Respectfully Submitted,

B. W. PERKINS,

Attorney for Plaintiffs in Error.

112-217

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884. No. 948.

THE BOARD OF COUNTY COMMISSIONERS OF LABETTE COUNTY et al.,

Plaintiffs in Error,

vs.

THE UNITED STATES, ex rel. CLARENCE F. MOULTON,

Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

STATEMENT, JOINDER IN ERROR AND ARGUMENT FOR DEFENDANT IN ERROR.

S. E. BROWN,

Attorney for Defendant in Error.

HON. B. W. PERKINS,

Attorney for Plaintiffs in Error.

C. G. BURGOYNE, PRINTER, 57, 59 & 61 PARK ST., N. Y.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1884.

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THE BOARD OF COUNTY COMMISSIONERS OF LABETTE COUNTY ET AL.,
Plaintiffs in Error,

AGAINST

THE UNITED STATES, EX REL. CLARENCE F. MOULTON,
Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

STATEMENT, JOINDER IN ERROR AND ARGUMENT FOR DEFENDANT IN ERROR.

Statement.

This case was brought by the plaintiffs in error to review the judgment of the Circuit Court, adjudging that the relator have his peremptory writ of mandamus, commanding the Board of County Commissioners of Labette County, Kansas, to levy a tax upon the taxable property in the Township of Oswego, as constituted in the year 1870, when the debt was contracted, sufficient to pay the judgment of the relator, and commanding the other respond-

ents, the clerk and treasurer of the corporation known in law as the "Board of County Commissioners of Labette County, Kansas," respectively and in due time to perform their several duties of extending the tax so to be levied, and of collecting the same at the time and in the manner provided by law.

The judgment sought to be reviewed was rendered December 1st, 1881, and by agreement the case in error was to have been submitted at the October Term, 1883, the Court below refusing to grant a *supersedeas* unless the case was submitted at the October Term, 1883, under Rule 20, and it was so stipulated. The record filed by plaintiff in error not being considered by defendant in error full and complete, a motion for *certiorari* for diminution of the record was filed and heard on January 7th, 1884, and it was then stipulated by counsel that the record of the case in the Circuit Court brought up by the defendant in error in connection with, and support of, his motion for a *certiorari* should be the record in this case, which stipulation is on file with the Clerk of this Court. The judgment at law upon which all the proceedings are based was rendered the 7th day of June, 1877.

An information for mandamus was filed August 15, 1877, and an alternative writ granted and duly served, and, on relator's own motion, quashed, for some apparent informality, on December 10th, 1877.

On that day a further alternative writ was granted and the same was served April 15th, 1878 (Printed Record, p. 9).

At the June Term, 1878, the Board of County Commissioners made return to this writ (p. 14, P. R.), in substance:

1st. That the time had not arrived for the levy of taxes for 1878.

2d. That the board could not levy without the *assistance and coöperation of the Trustees of Oswego Township, and that said Trustees refused to coöperate or assist.*

On demurrer to this return, judgment granting a peremptory writ was entered, June 10th, 1878, and this judgment is still in full force and effect, and has not been reviewed on error (P. R., p. 16).

A peremptory writ was issued on this judgment, and served August 5, 1878 (pp. 18-20, P. R.).

No return of obedience, nor any return whatever, having been made to this writ, contempt proceedings were begun in March, 1879, and in November, 1879, the return of the board was filed (p. 23, P. R.) to the effect that they had levied the tax, but showing no further obedience to the mandate of the writ; hence the proceedings in contempt were further prosecuted, and on the 11th of June, 1880, the commissioners filed a return to the rule to show cause why they should not be punished for contempt (p. 27, P. R.); to which the relator demurred and the Court overruled the demurrer (P. R., 29-37), setting forth reasons *in extenso*, but in substance holding that as to the matters of extending the tax and the collection of the same, the clerk and treasurer of the county should be served with the writ and declaring that the remedy was to take a new writ against the clerk and treasurer, and that such writ would be freely granted at any time (2 McCrary Circuit Court Rep., pp. 29-33, P. R.).

It appeared to the Court, from the argument and admissions made thereon, that the tax levied by the commissioners, under the writ of 1878, was levied the first Monday of August, 1878, but no return was made by them of such levy till November 25th, 1879 (P. R., p. 23), and that the clerk had been enjoined from extending the tax upon the tax-roll; that the counsel for plaintiffs in error was Pre-

siding Judge of the Court which granted said injunction, but that he did not act, a Judge *pro tem.* being elected by the bar. These facts are brought into the record prepared and filed by defendant in error (p. 63, P. R.), and on January 7th, 1884, by written stipulation filed in this Court, the printed record was agreed to as the record in the case, a change being agreed upon and written in the copy filed, to which the stipulation is attached, to the effect that the Judge *pro tempore* was selected by the bar and not appointed by Hon. B. W. Perkins, the Judge of the Court. (See fols. 251–2 with written corrections.)

As will be shown in argument, the tax of 1878 being wholly unavailable, in December, 1880, the time of the decision and suggestion of the Court below, for the reason that the statutes of Kansas require each step in the procedure for the enforcement of taxes to be taken at a particular time and in a particular manner, and being wholly unavailable at the time the commissioners first made return of the fact of the levy to the Court, November 25, 1879 (p. 23, P. R.), for the same reasons, the plaintiff, being without other remedy, filed a further or amended information, embracing the Clerk and Treasurer of the County, and set forth (in addition to what the prior information stated, viz., the powers and duties of the Board of County Commissioners and the neglect to perform the same), the duties of the Clerk and Treasurer, and their neglect and refusal, and asked for and obtained another and further alternative writ broader in its scope than that awarded by the judgment of June 10, 1878 (P. R. 38–41 for information; P. R., 44–48 for writ).

To this writ the respondents below demurred, and judgment awarding a peremptory writ of mandamus was entered December 1st, 1881 (P. R., p. 51).

The plaintiffs in error insist that the judgment of

the Court below was erroneous, and sue out this writ of error.

JOINDER IN ERROR.

Now comes the defendant in error, Clarence F. Moulton, and says there is no error in the record, and that the judgment of the Court below ought to be in all things affirmed.

S. E. Brown,
Attorney for Defendant in Error.

ARGUMENT.

I.

It might be sufficient to say in support of the judgment below that all the questions presented by this record are conclusively determined and adjudicated in favor of the relator by this Court in the case of the Board of County Commissioners of Cherokee County, Kansas, vs. William C. Wilson, decided at the October Term, 1883 (3d Sup. Court Reporter, 352).

The writ in that case was framed upon the writ in the case at bar, the judgment was rendered long after the judgment in the present case, and but for the unfortunate delay caused by the necessity of moving for a *certiorari*, this case would have been first presented to your Honors. There is little or nothing to present in addition to the learned and exhaustive argument of the learned counsel for the defendant in error in that case, of whose labor we avail ourselves in the presentation of our case.

But counsel for plaintiff in error appear to think the case cited is not conclusive, for the reason that the Clerk and Treasurer did not there complain,

while we submit the questions were raised more fully and clearly than in this record.

In the present case the demurrer is as follows:

Now come the respondents by their attorney, B. W. Perkins, and jointly and severally demur to the alternative writ of mandamus heretofore issued herein, and ask that the same be quashed and set aside for the reasons following, to wit:

1st. Because the Court has no jurisdiction of the persons of the respondents or the subject of the action.

2d. Because of defect of parties defendant.

3d. Because several causes of action are improperly joined.

4th. Because the writ does not state facts sufficient to entitle the relator to the relief demanded against the respondents.

Wherefore the respondents ask to be discharged with their costs.

B. W. PERKINS,
Attorney for Respondents.

In the case cited the demurrer or motion to quash is as follows:

"FIRST. The writ is issued without any authority "of law against these respondents, as they nor "neither of them were parties to the action in which "the judgment described in the said writ was ren- "dered, nor did they have any notice of said judg- "ment until long after the same had been ren- "dered.

"SECOND. Said writ is void for duplicity. It in- "cludes persons and officials not authorized to act "in the premises, and whose duties, if authorized "to act whatever, are entirely different and unlike.

"THIRD. The respondents, nor none nor any of "them, are authorized to levy the tax sought to be "levied, nor is it a duty incumbent upon any of "them to make such levy.

"FOURTH. The respondents, nor none nor any of "them, are authorized by law to make any levy "for any purpose whatever, except on the first "Monday of August of each year, and that they "had no notice of the judgment described in said "writ until in November, 1881, for the truth of "which we refer to the affidavit attached to the "motion made to quash the original writ herein, "and the only time they could levy the tax sought, "if at all, was on the first Monday in August, 1882, "and that prior to such time the writ herein had "been allowed, issued and served, and at such time "these respondents were not in default."

It is to be observed that in their demurrer in the case at bar neither the board nor the clerk nor the treasurer complain or assign as ground of demurrer, the *improper joinder* of themselves as defendants; but, as to parties, complain of a *defect*, and in argument urge the *non-joinder* of the trustee of Oswego township.

Hence we submit the case cited is conclusive of the questions raised in this record.

Out of caution, however, we submit some considerations in support of the judgment below.

As respects the board of commissioners, all questions in the record are *res adjudicata*, in the judgment in this case of June 10th, 1878 (P. R., p. 16), to review which no writ of error was ever taken. The same learned counsel there raised the question that this board could not levy the tax without the co-operation and assistance of the trustee, and *declared that the trustee refused to co-operate or assist* (P. R., 14).

The alternative writ of December 10, 1878 (P. R., p. 10-12), commanded the board to levy, collect and pay over a tax * * * or show cause * * * They appeared and showed cause, to wit, that it had no power to do anything—not even to levy.

After full argument on demurrer to the return, it was adjudged an insufficient return, and a peremptory writ was adjudged to the relator.

Now, this judgment is conclusive upon the board, no matter what other defense it had; no matter what other, or further, or different return it could have made—it is forever concluded. *Interest reipublicae ut sit finis litium.*

The case of Louis LeGuen vs. Isaac Gouverneur and Peter Kemble,—1st Johnson's Cases, 436-524,—argued by counsel whose names are historic, and decided by judges that have shaped our jurisprudence,—Burr, Hamilton, Morris, Kent, Radcliff,—is decisive.

We quote one sentence from Kent's opinion in the case cited: "The general rule is intended to prevent litigation, and to preserve peace; and were it otherwise, men would never know when they might repose in security on the decisions of courts of justice; and judgments solemnly and deliberately given, might cease to be revered, as being no longer the end of controversy and the evidence of right."—Last two lines of page 502 and first four lines of page 503, 1st Johnson's Cases. This case was one of great consideration for the vast interests at stake (for those days) as well as for the distinguished learning and ability displayed in the argument and decision. It certainly is the best considered case on the subject of *res adjudicata* in the reports of the land. It clearly established the doctrine that a party litigant is bound not merely to defend when called upon in a court of justice, but to set forth *all* his defenses, and if he fails so to do he is forever thereafter to hold his peace.

This board defended, or attempted to do so, against the writ, and its defense was held insufficient and unavailing. If it had any other or better defense, it should have pleaded it. Not having so done, it is forever bound by the judgment.

The writ of mandamus is simply the execution of this Court. In fact, it is the only process in the nature of execution that *can* issue against a municipal corporation from *any* Court, *State* or Federal, in Kansas, the law expressly prohibiting the ordinary writ of execution against municipal corporations; and the alternative writ of June 10, 1881, including the Clerk and Treasurer, is simply a further and amended writ of execution, an alias *fieri facias*. It was framed to embrace these two officers in order to effectuate a more perfect levy and compel satisfaction of the judgment, and the bringing in of the board in this writ and the amended or further information on which it was based, was a work of supererogation, as an alias writ, as respects the Board of County Commissioners, might just as well been issued on the judgment for a peremptory writ of June 10, 1878.

II.

It is contended by the learned counsel that this is an original action of mandamus brought in this Court, and hence the confusion of ideas running through his entire argument as to the jurisdiction of the Court over the persons of the respondents, and the causes of action and as to the improper joinder of causes of action. Strictly speaking, the whole proceeding since the judgment at law of June, 1877, on the coupons, is ancillary and is but the final process of the Court set in motion to execute its judgment, and to speak accurately, there is no such thing as a "cause," or "causes of action," or "joinder," of them, "proper" or "improper."

It is urged, however, that the respondents are strangers to the debtor corporation, the township, and not its officers, and hence the Court has no jurisdiction and the statutes are set forth at some length.

Counsel, however, stopped short and omitted any mention of the Laws of 1874 and 1876.

Let us, therefore, turn to those provisions of the laws of Kansas, authorizing the issue of township bonds, which specify the mode of levying taxes to pay the interest and principal thereof. The first general act on the subject is the act approved February 25, 1870, entitled "An Act to enable municipal townships to subscribe for stock in any railroad and to provide for the payment of the same," and the act is to be found at pages 189, 190, 191 and 192 of the Session Laws of Kansas for the year 1870. The first five sections of the act provide for an election in the township, the canvassing of the vote, the subscription to the stock of the railroad company and issue of the bonds of the township thereto, and section 6 of the act provides as follows, viz.:

"SEC. 6. Whenever any bonds shall be issued in pursuance of the foregoing provisions, it shall be the duty of the *Board of County Commissioners* annually to proceed to levy and collect a tax on all the taxable property in such township sufficient to pay the interest on such bonds as the same becomes due, and to create a sinking fund sufficient to pay said bonds at maturity; and such tax shall be collected in cash or the coupons of such bonds which may be due; and *such tax shall be collected as county and township taxes are collected*, and paid out by the treasurer on presentation of the coupons or bonds, when due; and the county clerk, treasurer, and other officers who may be required to do any act under the fore-

"going provisions, shall be entitled to the same "fees as are allowed by law for similar services, "and liable to the same fines and penalties for non- "compliance."

Here the County Board is required to levy the township tax to pay the debt provided for, without the trustee being required to act in any way, which is accounted for by the fact, as we are informed, and as the record in this case tends to show, that it had become the practice, under the provisions of the general revenue law which we have cited, for the County Board to levy all township taxes without any act on the part of the trustee being performed apart from his report and recommendation to the board as to the amount necessary to be raised for township purposes by taxation, which report and recommendation from the township trustee are wholly unnecessary in the case of the tax required to pay township bonds, for the reason that a record of the amount of the township bonds and the rate of interest which they bear, is kept in the office of the county clerk, where full information as to the amount of tax required for that purpose is constantly accessible, by the merest reference, to the county board, who, being thus provided with the amount of money necessary to be raised by the township, and being possessed of the county assessment roll, including that of the particular township, are unqualifiedly required by this section of the act which we have cited, to levy sufficient taxes on the township from year to year to pay the debt as it accrues. The same section requires the county treasurer to pay the tax when collected direct to the bondholder, and none of the township officers have anything to do with the tax, either in its levy, collection, receipt or payment. The bonds in controversy herein (P. R., p. 11) were voted under this Act of February 25th, 1870.

We now come to the Act of March 2d, 1872, which is the next general act upon the subject, and is to be found at page 110 of the Kansas Session Laws for 1871. The act is entitled "An Act to authorize "counties, incorporated cities and municipal town- "ships to issue bonds for the purpose of building "bridges, aiding in the construction of railroads, "water-power, or other works of internal im- "provement, and providing for the registration of "such bonds, the registration of other bonds, and "the repealing of all laws in conflict therewith."

This act provided for the subscription to the stock of, and issue of bonds to a railroad company by any county, city or township whose voters, in the manner prescribed, should, at an election held for the purpose, vote in favor of the subscription and issue of the bonds. The act adopted a complete scheme covering the entire subject of railroad-aid bonds which should thereafter be issued in that State, and probably operated as a repeal by implication of the act cited, of February 25th, 1870, whose provisions, except as they were amended, were substantially re-enacted in this Act of March 2d, 1872, and much more added thereto, covering the entire subject.

The Act of February 25th, 1870, related alone to bonds which should be issued to railroads by townships, while the Act of March 2d, 1872, related to bonds which should be issued by counties, cities and townships. By section 11 of the Act of 1872, it was provided that the bonds, when signed, should be delivered in escrow to the State treasurer to await compliance with the terms of the subscription by the railroad company, and by section 14 it was provided that after compliance with the conditions of the subscription, and delivery of the bonds to the parties entitled thereto by the State treasurer, they should be registered with the State auditor, who should thereupon certify on the bonds that they were lawfully issued.

that the signatures thereto were genuine, and that they had been registered in his office. These sections were construed by this Court in the case of *Lewis vs. Commissioners*, (105 U. S., 739). By section 16 it was provided that the State Auditor should annually, on or before the fifteenth of August, ascertain the amounts due for interest on all bonds registered in his office, and certify the same to the county clerks of the counties where the bonds were issued; and by section 17 it was provided that the county clerks, upon receiving these statements from the State auditor, should proceed to ascertain the amount to be raised by the county, city or township shown by the State auditor's certificate to be indebted, and should thereupon make the necessary levy therefor on the property of the county, city or township, as the case might be, and extend the levy in the county tax book, and that these taxes should be collected by the county treasurer the same as other taxes. Section 18 provided that the county treasurer should pay to the State Treasurer the taxes thus collected, and section 19 provided that the State Treasurer should pay the money thus received to the holders of the bonds and coupons for whom the same had been collected and received.

These provisions respecting the State Treasurer and State Auditor were new, and the scheme for registering the bonds and levying the taxes for their payment by the State Auditor, and for the payment of the taxes to the bondholders through the State Treasurer, was an untried one, and utterly divergent from the system of levying county and township taxes which, as we have seen, had prevailed in Kansas up to that time, and which system, as to all other taxes, except those provided for by this act, continued to exist the same as before. But this new scheme of levying taxes was short-lived, and only

continued to exist for two years, when the Act of March 9th, 1874, amendatory of the Act of 1872 was passed, repealing all these new provisions in the act of March 2d, 1872, and re-enacting the old method of levying township taxes for the payment of bonds by the county board.

The Act of 1874 is at page 41 of the Session Laws of Kansas for 1874, and is entitled "An act amend-"atory of and supplemental to chapter sixty-"eight, of the Session Laws of 1872, entitled 'An "'act to authorize counties, incorporate cities and "'municipal townships to issue bonds for the "'purpose of building bridges, aiding in the con-"'struction of railroads, water-power, or other "'works of internal improvement, and providing "'for the registration of such bonds; the regis-"'tration of other bonds, and the repealing of "'all laws in conflict,' and to repeal chapter "twenty-nine of the Session Laws of 1869, and "to provide for the issuing of railroad and other "bonds, and to limit the issuing of school bonds, "and to punish the officers herein named for a "violation of the provisions of this act."

By section 16 of this act all the provisions in the Act of March 2d, 1872, relative to the levy and collection of these taxes through the instrumentality of the State Auditor and State Treasurer, were repealed, and in lieu thereof the old system of levying township taxes to pay township bonds which devolved the duty upon the county board, both under the general laws, and by section 6, of the Act of February 25th, 1870, cited, was restored by sections 7 and 13 of this amendatory act of 1874, which provided as follows:

"SEC. 7. It shall be the duty of the proper offi-"cers of any county, city or township, in which "bonds have been heretofore voted for any of the "purposes mentioned in the act to which this act is

"amendatory, *annually at the time when other "taxes are levied*, to levy and cause to be collected "a sufficient tax to pay the interest on all such "bonds as the same shall become due, and also for "the purpose of creating a sinking fund for the "final redemption of such bonds.

"SEC. 13. It will be the duty of the *Board of "County Commissioners* of any county in which "railroad bonds shall be issued under the provisions "of this act, annually, at the time when other taxes "are levied, to levy and cause to be collected *as "other taxes are levied and collected*, a sufficient "tax to pay the interest on all bonds issued for rail-"road purposes by such county, *or any township "therein*, as the same falls due, and also for the "purpose of creating a sinking fund for the final "redemption of such bonds."

It was argued in the Court below by the counsel of the county board, that by the use in said section 7 of the words: "It shall be the duty of the proper "officers of any county, city or township in which "bonds have been heretofore voted to levy a suffi-"cient tax," the Legislature intended, in the case of township bonds, that the township officers should levy the tax instead of the county board. But the object of the framer of this section was not to create a new system for the levy and collection of taxes, but as the act provided for the issue of bonds by counties and townships, and also by cities having different chartered provisions depending on the class to which the city belonged, the Legislature intended by the use of these general words, "It shall be the duty of the proper officers," without specifying who the proper officers were, to provide that where bonds should be issued, the officers who customarily, under existing laws, levy and collect taxes should do so to pay the interest and principal of the bonds thus issued. The mind of the Legislature was on the

subject of providing payment for bonds whose issue it had authorized, and not on the system of levying and collecting taxes; and by the use of this general language the duty is imperatively enjoined on the proper officers to levy the requisite taxes. Who are the proper officers of the township to make the levy is not specified in this section seven. As we have seen, the members of the county board not only create the township, but in the exercise of their supervisory powers over the township officers, and all the concerns and business affairs of the township, the commissioners act for the township, and, as to those powers, would be rightly designated if called the "proper officers" of the township. So that it does not follow from the use of the words, "the proper officers of any county, city or township," that the Legislature intended that county commissioners should no longer levy township taxes. But if there were still any doubt upon the subject, it is removed by said section 13, cited from the same Act of 1874, which contains said section 7, and which section 13 specifically provides, as we have seen, that "it will "be the duty of the Board of County Commis- "sioners to levy a sufficient tax to pay the interest "on all bonds issued by any township." And this section 13, being a part of the same act with said section 7, the language of section 13 shows who were meant by the words "proper officers" in section 7, so far as concerns the levy of taxes for township purposes.

It certainly could not have been the intention of the Legislature by the same act to provide different systems for the levy of township taxes to pay the same class of bonds authorized by the same act. It will not reasonably be argued that by section 7 it was intended that the trustee should levy the tax, and that by section 13 that duty was devolved upon the county board. If this were not so, the inquiry

would at once arise, which of the bonds authorized by the act was it intended should be paid by tax levies made by the township trustee, and which of them was designed to be satified by tax levies mades by the county board.

And this Act of 1874, being an amendatory one of the Act of 1872, and the provisions in the Act of 1872 providing the mode of levying taxes thereunder having been repealed by the Act of 1874, and the latter act having provided in lien thereof that all levies made thereafter should be made by the county board, this mode became the established one for all levies thereafter made, either to pay bonds and coupons issued under the original Act of 1872, or the amendatory one of 1874. An original act and an amendment to it should be construed as one act, and the amendatory act operates precisely as if the subject matter of the amendment had been incorporated in the prior act at the time of its adoption, so far as regards any action had after the amendment is made.

Holbrook vs. Michal, 36 Ill., 161.

And this is the settled rule in Kansas for the construction of her statutes.

Burgess vs. Railroad Co., 18 Kansas, 53–57.

Therefore, since the amendatory act of 1874 was passed, all levies of taxes to pay township bonds, issued either under the original act of 1872 or the amendatory act of 1874, were required by the amendatory act to be made by the county board; and it is thus made manifest to a demonstration that the tax levies to pay the bonds in controversy, voted under said act of February 25th, 1870, have been required, since March 9th, 1874, to be made by the plaintiffs in error. This act of 1874 was amended in 1876 by

an act approved February 25th, 1876, to be found at page 217 of the Session Laws of Kansas for 1876, entitled "An act to enable counties, townships and "cities to aid in the construction of railroads, and "to repeal section eight of chapter thirty-nine of "the laws of 1874." By section six of this act of 1876 it is provided as follows:

"SEC. 6. Whenever any bonds shall be issued in "pursuance of the foregoing provisions, it shall be "the duty of the *board of county commissioners*, or "the mayor and council of the city, to levy and col- "lect annually, in addition to other taxes, a tax on "all taxable property in such *county*, *township* or "city sufficient to pay the interest on such bonds "as the same shall become due, and to create a "sinking fund sufficient to pay said bonds at ma- "turity; *and such tax shall be collected as other* "*taxes are collected*, and paid out by the treasurer "on presentation of the coupons or bonds when "due, at the treasurer's office or at such place as "may be specified in the petition or proposition "herein mentioned."

And at page 212 of the same Session Laws of 1876 is to be found another act on this subject, entitled, "An act to enable counties, townships and "cities to extend aid in the construction of railroads "and provide for the issue and purchase of bonds, "and to punish the violation thereof," approved February 24, 1876. By the concluding clause of section 9 of this act it is provided as follows:

"And it shall be the duty of the *board of county* "*commissioners to levy and collect, as all other* "*taxes are levied and collected*, upon the taxable "property of the county, in case such bonds were "issued in behalf of such county, *and on the tax-* "*able property of any township, on behalf of which* "*such bonds may have been issued*, a like tax, "which, together with the county and township

" taxes, to be levied and collected on the property " of the railroad company receiving aid under the " provisions of this act within such county or " townships, or such part thereof as shall be applied " to that purpose, shall be sufficient to pay the in- " terest on the bonds so issued, and to provide in " addition to such railroad tax and the income " from, and the proceeds of, the mortgage bonds " purchased by it of such railroad company, for the " payment of the principal of the bonds by it so " issued."

These are all the laws of a general nature in the State of Kansas authorizing the issue of township bonds to railroads that we have been able to find.

It is clear that the law of 1870 was incorporated into and became a part of the contract; that as the law stands, or stood, till the act of 1883, which was passed after this decision was made, the Board of County Commissioners were the officers to levy the tax on townships to pay railroad bonds issued under the various acts on that special subject; and that, at all events, under the general law, they must levy the tax in the precise case made by the plaintiffs in error themselves, namely, the case of refusal to co-operate on the part of the trustee.

A short answer to the counsel's argument upon the assumption that the board are strangers to the township, as well as a conclusive one is, that under the statutes cited as to township aid bonds, the Board of County Commissioners are, as to the levy of taxes, *pro hac vice*, officers of the town. A duty is laid upon them by law; a function is to be performed by them. The law might have provided that *any* person or officer should levy the tax, and no matter what his other powers and duties were or what his official title might be, as to this particular duty he became a special officer, bound in law to perform the same.

The counsel's argument proves too much when he says the plaintiffs in error, not being connected with the suit of relator against the township, should not be subjected to this writ.

The trustee was not a party either, and so the question reverts *who are* the officers to whom the execution of this Court is to be directed, to enforce the satisfaction of this judgment? We say to those upon whom, by the law of the contract and the law since, the duty is laid to not merely levy, but collect and pay over a tax sufficient to pay the same.

It is a part of the history of Kansas that for many years the Township of Oswego has not elected any officers whatever. The Court below knew this, and besides, at every term for the last seven years, had judicial notice from its own records, that the township had been summoned to each term in numerous suits on its bonds, and returned by the marshal *non est inventus*, and that eminent practitioners of the district, such as Mr. A. Williams, of Williams & Dillon, had caused summons to be published against the township as an "*absconding debtor*" in suits on the same bonds! Yet, the land is there, the people are there, but not an officer. Any trustees that may once have lived and flourished in the township, are either dead or "gone to the mines."

The "*refusal*" as a trustee, to concur in the tax levy of 1878, in this case, was well put by counsel. There was no trustee to concur or co-operate.

The counsel complains that no default could be presumed on the part of the clerk or treasurer until a levy was made. We think we have shown by the amended record we filed what is tantamount to a refusal and neglect of the clerk. It is said in 2 Dillon's Municipal Corporations (3 Ed., § 867): "There "may be such an unequivocal assertion of a settled "purpose and determination not to perform a defi- "nite public duty as not only to dispense with a

" formal demand, but to justify the Court in award-
" ing the writ before the evil is done or the derelic-
" tion of duty has actually occurred."

And he cites in support of that statement of the law the elaborate opinion where all the authorities on this point are collected, of Mr. Justice Gray, now a member of this Court, in the case of *Attorney-General vs. Boston* (123 Massachusetts, 460, 470 to 477).

But beyond all this we say the alternative writ is the declaration, and it alleges, after setting forth the duties of the clerk and treasurer, a neglect and refusal of these officers to perform their several duties, and the demurrer *confesses the truth of the allegations of the writ.* If the gentleman had desired to contest them he should have *traversed* the writ and then all the evidence *pro* and *con* could have been brought into the record, and we should very much like to have it before this Court.

As to the case in 20 Wis., p. 88, cited by counsel, suffice it to say that there were two distinct and separate corporations sought to be reached by a writ directed to the two sets of officers of such corporations. In this case the officers affected by the writ, to wit: the Board of County Commissioners, were by law, *pro hac vice, the* officers of the township.

And the clerk and treasurer are the subordinate officers of the corporation known as the Board of County Commissioners.

The "Board of County Commissioners of Labette Co." is the name of the corporation. The statutes of Kansas are as follows: Dassler Compiled Laws 1879, sec. 1385, "that each organized county within this State shall be a body corporate and politic, and as such shall be empowered for the following purposes: First, to sue and be sued." * * *

Sec. 1386: "The powers of a county as a body " politic and corporate shall be exercised by a Board " of County Commissioners."

III.

A writ in this form is the relator's only remedy.

The tax of 1878 was wholly unavailable and afforded and could afford no satisfaction of the relators judgment.

And no tax would be valid and effectual unless the officers took each step in taxation strictly at the time prescribed by law.

We give here statutes of Kansas relating to tax procedure.

Dassler's Compiled Laws 1879:

"(5988) The duties of the township trustee shall "be: *Eighth*—Shall superintend all the pecuniary "concerns of his township, and shall, at the July "session of the Board of County Commissioners, "annually, with the advice and concurrence of said "board, levy a tax on the property of the citizens "of said township, for township, road and other "purposes, and report the same to the county clerk, "who shall enter the same on the proper tax roll, "in a separate column or columns, and the treas-"urer shall collect the same as other taxes are col-"lected; *but in a failure of such trustee and com-"missioners to concur, then the Board of County "Commissioners shall levy such township, road and "other taxes.*"

§ 5856. The County Commissioners shall meet on the first Monday of August in each year and shall estimate and determine the amount of money to be raised by tax for all county purposes and all other taxes which they shall be required by law to levy.

§ 5857. The County Clerk, immediately after the first Monday in August, shall proceed to determine the sums in dollars and cents, rejecting fractions of a cent, to be levied upon each tract or lot of real property in the name of the owner, if known, and

upon the amount of personal property in the name of each person, company or corporation which shall be assessed equally upon all real and personal property subject to the same tax and set down all taxes in one column. School, district and road taxes excepted. He shall complete the same and attach his certificate thereto and deliver it to the County Treasurer on or before the first day of November, and shall charge the Treasurer with the amount of the respective taxes assessed on the tax roll. For every day after the first day of November that the County Clerk shall retain such tax roll in his possession the County Board shall deduct from his pay five dollars.

§ 5858. All taxes shall be due on the first day of November of each year. A lien for all taxes shall attach to the real property subject to the same on the first day of November in the year in which such tax is levied, and such lien shall continue until such taxes, penalty, charges and interest which may have accrued thereon shall be paid by the owner of the property or other person liable to pay the same.

§ 5861. As soon as the County Treasurer shall have received the tax roll of his county he shall cause a notice to be published in a newspaper published in his county, or if there be none, then in a paper having general circulation therein for two consecutive weeks, stating in said notice the amount of taxes charged for State, county, township, school, city or other purposes on each one hundred dollars' valuation.

§ 5865. All taxes on personal property that shall remain due and unpaid on the first day of January or the first day of July may be collected in the following manner: The County Treasurer shall, between the tenth and fifteenth days of January and July respectively, issue a warrant under his hand directed to the Sheriff of the county, commanding

him to levy the amount of such unpaid tax and the penalty thereon, together with his fees for collecting the same, of the goods and chattels of the person to whom such taxes were assessed and to pay the same to the County Treasurer and return such warrant within sixty days from the date thereof.

§ 5878. Provides that all real estate on which taxes are not paid by June 20 shall be subject to sale as hereinafter provided.

§ 5879. The County Treasurer, between the first and tenth of July in each year, make out a list of all lands and town lots subject to sale, describing such lands and town lots as the same are described on the tax roll, with an accompanying notice stating that so much of each tract of land or town lots described in said list as may be necessary for that purpose will on the first Tuesday of September next thereafter and the next succeeding days be sold by him at public auction at his office for taxes and charges thereon.

§ 5880. The County Treasurer shall cause the said list with the accompanying notice to be published in some newspaper published in said county, or if no newspaper be published in said county, then in one of general circulation in his county once in each week for four consecutive weeks prior to the day of sale; and shall also cause to be posted up a copy of said list and notice in some conspicuous place in his office.

§ 5882. On the day designated in the notice of sale the County Treasurer shall commence the sale of those lands and town lots on which the taxes and charges have not been paid and shall continue the same from day to day (Sundays excepted) until such parcel or so much of each parcel shall be sold as shall be sufficient to pay the taxes and charges thereon, including the costs of advertising and the fees for selling.

§ 5910. The County Treasurer, at least four months before the expiration of the time limited for redeeming lands as aforesaid, shall cause to be published in some paper published in, or of general circulation in, his county once a week for four consecutive weeks (the publication herein provided to be completed at least four months before the day of sale) a list of all unredeemed lands and town lots, describing each tract or lot as the same was described on the tax roll, stating the name of the person to whom assessed, if any, and the amount of the taxes charged and interest calculated to the last day of redemption due on each parcel, together with a notice that unless such lands or lots be redeemed on or before the days limited therefor, specifying the same, they will be conveyed to the purchaser. * * * He shall also cause to be posted for the same length of time such list and notice in at least four public places in the county, one of which shall be in some conspicuous place in his office.

§ 5915. If any land sold for taxes shall not be redeemed within three years from the day of sale the County Clerk of the county where the same was sold shall, on presentation to him of a certificate of sale, execute in the name of the county as County Clerk, under his hand and seal, of the county, to the purchaser, his heirs and assigns, a deed to the land so remaining unredeemed, and shall acknowledge the same, which shall vest in the grantee an absolute estate in fee simple in such lands, subject, however, to all unpaid taxes and charges, which are a lien thereon; and such deed duly acknowledged shall be *prima facie* evidence of the regularity of all proceedings, from the valuation of the land by the assessor inclusive up to the execution of the deed, and may be recorded with the like effect as other conveyances of land.

It has been held under these statutes by the Su-

preme Court of the State that they must be followed with the utmost strictness or a tax deed would fail.

The following are illustrations: Where there is a good description in the tax deed, yet the title will fail where the description in the notice and tax sale certificate is defective.

28 Kansas.
26 Kansas, 828.

"The omission to state the place of sale in the notice avoids a tax deed."

24 Kansas, 198, 16.

This though the law fixes the place of sale.

"The provisions as to the publication of the redemption notice are mandatory."

Long vs. Wolf, 25 *Id.*, 522.

This though it would seem that a purchaser's rights are fixed when he receives the tax certificate, he having no control over the publication of the subsequent redemption notice.

If notice be published too soon it invalidates the tax deed.

22 *Id.*, 606.

The relator was entitled to such a levy and such procedure as would if followed up result in a valid tax deed, in case of refusal to pay the tax by the owner of lands; and it is safe to presume that in a hostile and repudiating township, that has no officers, the inhabitants would not pay a tax for this judgment unless obliged so to do under stress of losing their property under tax sale.

Add to this that the tax is unavailable, the further fact that the clerk has submissively allowed an injunction to be granted against him from extending the tax of 1878, it is patent that the relator can ob-

tain no satisfaction of his judgment from that source.

It is urged that the clerk and treasurer cannot perform the duties severally imposed on them by law until after a levy, and that the writ commands the simultaneous performance of all duties by all the respondents. Not so; this is not the true construction of the writ. It requires each officer to do his duty in the *manner and at the time provided by law.*

It is orderly and consecutive in its mandatory part, and simply requires the officers to *consecutively* perform the duties which the law lays upon them, and which it is admitted by the demurrer they have not performed.

It was no hardship upon the clerk or treasurer to be joined in the writ, for as was said by Chief Justice WAITE, in the Cherokee County case, *supra*, "the duties of the clerk and treasurer are purely ministerial."

But the clerk not merely neglected that ministerial and clerical duty of extending the tax, but evinced his determination to evade the duty, and tamely and submissively permitted himself to be perpetually enjoined from performing it, without a hint to the relator of the suit against him, or a suggestion in defense of the Federal mandate. Is it too much to say that he was meekly subservient to the learned Judge of his Court, then and now counsel for plaintiffs in error?

The officers concerned in the tax procedure should therefore be joined for the very plain reason that if a tax were levied in 1880, the board only being a party to the writ, another *mandamus* would probably have to be issued to this clerk to enforce an extension, and after a year's delay another against the treasurer to compel him to collect, and by reason of these delays, and in consequence of these omissions

to have every step in the tax procedure taken at the time prescribed by the law, the tax would be vitiated and no collection thereof could be enforced, and all tax sales would be void.

The only possible remedy was by a writ to all these officers. In fact it was the only proper practice. The writ is the execution, and to take it against these officers separately would be like taking out a *fieri facias* by piece meal.

The conclusion of the whole matter is that it is manifest from this record there is a determined spirit of repudiation as well as resistance to, or, at least evasion of, the execution of the Court below to enforce this judgment, not only by the parties to this record, but by the people, their counsel and the Judges of the State Court.

What a comedy was enacted when the learned counsel for plaintiffs in error descended from the judicial seat and put off the ermine and allowed a member of his bar to be elected by the attorneys present, a judge *pro tempore* to enjoin this clerk from extending this tax.

Surely "justice standeth afar off and judgment is turned away backward."

This injunction must have been granted prior to November 1st, 1878, for the clerk was bound to deliver the tax roll to the treasurer by that day, setting for the tax of 1878, as the object of the injunction was to prevent the extension of this tax levied in 1878 to pay the judgment, yet the board preserve a preternatural silence and only make return of the levy in November, 1879, and then only after proceedings for contempt had been begun.

The bonds in the case at bar were issued in 1870 and are governed by the same statutes as those in the case against Cherokee County *supra*, and we close by quoting the concluding part of the opinion

of the Chief Justice in that case, and submit that it is conclusive.

"The township trustee is in law the principal of-
"ficer of the township. It is his duty to superintend
"all the pecuniary concerns of the township, and,
"with the advice and concurrence of the Board of
"County Commissioners, to levy all taxes required
"to meet the liabilities of the township not other-
"wise provided for by law, but, if he fails in this
"duty, the board must, as we think, make the ne-
"cessary levies for him. To that extent the board
"is charged with the duty of caring for the inter-
"ests of the township. Such is the fair meaning
"of section 22 (5088). Under that section the town-
"ship trustee is required to attend the meeting of
"the board in July of each year and lay before
"them his recommendations for taxes to be levied.
"As his levy can only be made with the concurrence
"of the board, there must necessarily be an inquiry
"by the board into the pecuniary concerns of the
"township so as to determine whether what is rec-
"ommended by the trustee is enough or more than
"enough to meet its liabilities for the current year.
"If the trustee has omitted a tax for any purpose,
"which the law requires to be levied, it is the
"clear duty of the board to make the levy them-
"selves if the trustee will not. The trustee and the
"commissioners are made in law a tribunal to meet
"in July in each year to estimate and determine what
"taxes are required in the township for the year.
"If both the trustee and commissioners are present
"at the meeting and agree as to what should be
"done, the trustee reports the tax to the County
"Clerk, but if the trustee is not present, or being
"present does not agree with the commissioners,
"the opinion of the commissioners prevails, and
"they may proceed without him. This is the evi-
"dent purpose of the provision that, "in failure of

"such trustee and commissioners to concur," the "board shall make the levy. The tax to pay the "judgment in this case was one of the taxes to be "levied on the property of the township to pay a "township debt. It is true that this section of the "law was enacted in substance years before the "bonds involved in this suit were issued, but unless "it has been in some way superseded by reason of "the special acts connected with the particular ob- "ligation of these bonds, it governs this case. So "far as we are advised, if the tribunal, consisting "of the trustee and county commissioners, are re- "lieved from their general supervision of the needs "of the township in the way of taxation for these "bonds, it is only to put that duty on the board "alone. If on the board, it was clearly their duty "to levy the tax without the trustee at the meeting "in August, 1881, because the legal liability of the "township had then been judicially established. "If, however, it was a matter in respect to which "the trustee should act conjointly with them, both "they and the trustee were in default in July, 1881. "In any view of the case, the obligation to levy "the tax had been imposed on the County Com- "missioners when the alternative writ was sued "out, and they have shown no good cause why the "levy was not made.

"The Board of County Commissioners have alone "brought this writ of error. So far as appears the "clerk and treasurer are satisfied with what has "been done in reference to them. The board are "in no condition to complain for the other officers, "because, under the law, they must levy the tax "before the others can act, and, if the levy is made, "the duties of the clerk and treasurer are purely "ministerial. The whole proceeding depends on "the duty of the board to levy the tax.

"We conclude, therefore, that the motion to

" quash should have been overruled, and the mo-
" tion for judgment sustained. The first question
" is answered accordingly. The second question is
" answered in the affirmative.

" As the judgment was in accordance with these
" answers it is affirmed."

The judgment should be affirmed.

S. E. Brown,
Atty. for Defendant in Error.